UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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KEVIN COOPER,

Petitioner,

v.

JEANNE WOODFORD, Warden, San Quentin State Prison, San Quentin, California,

Respondent.

Case No. _____

DEATH PENALTY CASE

EXECUTION IMMINENT:
Execution Date February 10, 2004

PETITION FOR WRIT OF HABEAS CORPUS

TO THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Kevin Cooper, by and through his counsel, respectfully petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. Section 2254, *et seq.* and by this verified petition alleges the following facts and causes for issuance of the writ:

I.

PROCEDURAL BACKGROUND

A. Court entering judgment: Superior Court of San Bernardino County, San Bernardino, California.

B. Date of judgment: May 15, 1985

C. Sentence: Death.

D. Nature of Offenses: Four counts of Special Circumstances Murder, California Penal Code Section 187, California Penal Code Section 190.2(a)(3), multiple murders, and attempted murder in the first degree (Cal. Penal Code §§ 664, 187(a)) with infliction of great bodily injury (Cal. Penal Code § 12022.7).

E. Petitioner pleaded not guilty and was tried by a jury.

F. Petitioner's automatic appeal in state court from the judgments of conviction and death was filed on May 15, 1985. On June 19, 1985, state counsel was appointed to represent Petitioner on his automatic appeal.

1. Petitioner's automatic appeal was heard in the California Supreme Court.

2. Petitioner's conviction and sentence were affirmed by that Court in an opinion issued on May 6, 1991. *People v. Cooper*, 53 Cal. 3d 771 (1991).

3. Petitioner filed a petition for rehearing on May 21, 1991, which was denied by minute order dated June 26, 1991.

4. The issues raised in the automatic appeal were:

a. The Trial Court Erroneously Failed to Instruct the Jury Regarding the Lesser Offense of Second Degree Murder Which Was Necessarily Included Within Each Count of Murder and Was Supported by the Evidence;

b. The Trial Court Erroneously Failed to Instruct the Jury Regarding the Lesser Offense of Attempted Second Degree Murder Which Was Necessarily Included Within

the Offense of Attempted First Degree Murder;

c. The Jury's Inadvertent Receipt of Inadmissible Evidence and the Ensuing Discussion of That Evidence Supplied an Important Missing Factor in the Prosecution Case and Cannot Be Deemed Harmless Despite the Statements by the Jurors That They Could Disregard the Evidence;

d. After Ordering a Change of Venue the Trial Court Erred in Selecting San Diego County as the New Location for Trial; the Error Was Repeated When the Trial Court Denied the Subsequent Motion for a Change of Venue Out of San Diego County;

e. The Trial Court Erroneously Denied Defense Challenges for Cause Against Several Prospective Jurors;

f. The Trial Court's Refusal to Order Increased Juror Fees Upset the Demographic Balance of the Venire and Resulted in the Denial of a Jury Selected from a Representative Cross-Section of the Community;

g. The Trial Court Erroneously Refused to Impose Any Sanctions on the Prosecution Despite the Many Failures to Adequately Preserve Potentially Exonerating Evidence;

h. The Court Erroneously Ruled That the Dried Stain Analysis Techniques Utilized by the Sheriff's Office Analysts in this Case Were Accepted as Reliable Within the Scientific Community, and the Court Made Related Erroneous Rulings Regarding the Serological Evidence;

i. The Defense Was Erroneously Denied the Opportunity to Independently Test Any Bloodstain Evidence in a Manner Consistent With the Privilege Against Self-Incrimination and the Right to Effective Assistance Of Counsel;

j. The Trial Court Improperly Precluded the Defense From Cross-Examining Witnesses or Presenting Evidence at Trial Regarding Certain Matters Covered in the Hitch Motion;

k. The Trial Court Improperly Prevented the Defense From Adequately Investigating the Source of the Letter to the Editor Criticizing the San Bernardino County Sheriff's

Office;

l. The Trial Court Erred in Admitting Irrelevant Sentimental Photos of the Victims;

m. Numerous Acts of Prosecutorial Misconduct and Several Erroneous Rulings During the Cross-examination of Kevin Cooper Resulted in Substantial Prejudice to the Defense;

n. The Prosecutor Improperly Utilized Defense Expert Dr. Blake as a Witness Against the Defense, Thereby Interfering With Mr. Cooper's Right to the Effective Assistance of Counsel;

o. Crucial Portions of the Trial Proceedings Were Held Without the Presence of the Defendant and Without Any Proper Waiver of His Personal Appearance; the Problem Was Exacerbated by Defense Counsel's Unjustified Absence During Proceedings Involving the Deliberating Jury;

p. CALJIC 2.06 Is Invalid in the Absence of a Requirement That the Defendant Was Aware of the Fact That an Item He Destroyed Constituted Evidence;

q. Individually and/or Collectively, the Errors That Occurred During Trial Were Prejudicial;

r. The Guilty Plea to the Escape Count Must Be Vacated Because Appellant Was Not Advised That He Would Be Waiving His Right of Confrontation;

s. The Special Circumstance Must Be Reversed Because the Jury Was Not Required to Find an Intent to Kill;

t. A Variety pf Errors Allowed the Jury to Consider Improper Matters as Factors in Aggravation of the Penalty

u. The Trial Court Improperly Precluded the Defense From Presenting Proper Mitigating Evidence;

v. During Jury Selection, Various Errors Occurred When Prospective Jurors Were Challenged on the Basis of Their Attitudes Regarding Capital Punishment;

w. Challenges for Cause of Prospective Jurors With Strong Beliefs in Favor

of Capital Punishment Were Improperly Denied;

x. Various Instructional Errors Prevented a Proper Determination of Penalty Issues;

y. The Trial Court Erroneously Refused to Answer the Jurors' Question Regarding What Would Happen if They Were Unable to Agree on a Penalty Verdict; the Error Was Compounded by Holding a Hearing on the Appropriate Response Without Mr. Cooper Being Present;

z. Guilt Phase Errors That Do Not Require Reversal of the Conviction Must Also Be Considered in the Penalty Phase; Any Substantial Error at the Penalty Phase Must Be Deemed Prejudicial;

aa. The Present Death Penalty Statute Is Unconstitutional Because It Fails to Meet the Minimum Standards Necessary to Assure Rational and Consistent Application of the Death Penalty;

5. On October 24, 1991, Petitioner filed a timely petition for writ of certiorari with the U.S. Supreme Court, challenging the affirmance of Petitioner's conviction and sentence on direct appeal, which was denied on December 16, 1991. The question presented was: Did trial court limitations on Petitioner's ability to cross-examine sheriff's officers in order to prove their bias against him deprive Petitioner of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fair trial in accordance with due process of law, to confront the witnesses against him and present a defense, and to reliability in the fact-finding that supports a capital judgment?

6. On November 6, 1992, the District Court appointed Attorney Charles D. Maurer, Jr., to represent Petitioner in federal habeas corpus proceedings.

7. On August 11, 1994, Petitioner filed his first petition for writ of habeas corpus in the United States District Court for the Southern District of California. *Cooper v. Calderon*, Case No. 92-CV-427.

a. The grounds raised in the petition as originally filed on August 11, 1994 were:

(1) The Trial Court Erroneously and Prejudicially Failed to Deliver In-

structions on Second Degree Murder, a Necessarily Lesser Included Offense of First Degree Murder.

(2) Trial Counsel's Apprehension of the Law Caused Counsel to Preclude the Jury from Receiving Instructions on the Lesser Included Offense of Second Degree Murder.

(3) The Jurors' Improper Received Information Not Introduced in Court That Petitioner Had Previously Been Hospitalized for Mental Illness.

(4) The State's Failed to Preserve Evidence and Introduced Scientifically Unacceptable Evidence Analysis and Denied Petitioner of the Opportunity to Independently Test All Evidence Consistent with the Privilege Against Self Incrimination and the Right to Effective Assistance of Counsel.

(5) The Jury Was Allowed to Consider Improper Aggravating Circumstances and Not Allowed to Consider Relevant Mitigating Circumstances.

(6) Venue Was Not Changed to an Area Which Was Removed from the Saturation of Pretrial. Publicity and Jurors Who Did Not Represent a Cross Section of the Community Were Allowed to Serve Despite Challenges for Cause.

(7) The Jury Was Precluded from Considering and Counsel Was Precluded From Presenting Mitigating Evidence.

(8) Counsel Failed to Present and the Jury to Consider Relevant Information about Petitioner's Background and Childhood.

(9) Petitioner Is Being Deprived of His Rights under the Fifth, Sixth, Eighth and Fourteenth Amendments in That He Has Not Been Provided Adequate Support and Time for Counsel to Fully Investigate and Develop Issues Which Provide a Constitutional Basis for Setting Aside the Judgment in this Case.

8. On December 12, 1994 the district court heard the respondent's motion to dismiss the petition and a request for withdrawal submitted by counsel for Petitioner. The court found the claim regarding trial counsel's failure to present mitigating evidence regarding Petitioner's childhood and background to be unexhausted. The Court stayed the petition to permit Petitioner

to exhaust the claim.

9. On June 2, 1995, William McGuigan and Robert Amidon were appointed as substitute counsel for Petitioner.

10. On April 4, 1996, Petitioner filed his first state habeas petition.

b. The grounds presented were:

(1) Mr. Cooper Received Ineffective Representation During the Guilt and Penalty Phases Depriving Him of His Right to Effective Assistance of Counsel, His Right Against Cruel and Unusual Punishment, His Right Against Self-Incrimination, and His Right to Due Process and to Equal Protection of the Law under the California and United States Constitutions.

(2) The Trial Court Committed Various Errors of Constitutional Dimension.

(3) Impermissible Factors Were Considered in Selecting San Diego County as the Place of Trial.

(4) Selection of San Diego County for the Location of the Trial Violated Mr. Cooper's Right to a Fair and Impartial Jury.

(5) The Trial Court's Own Racial and Gender Based Animus during Jury Selection Deprived Mr. Cooper of a Fair and Impartial Trial.

(6) During Jury Voir Dire, the Trial Court's Own Racial Bias Limited Mr. Cooper's Ability to Obtain a Fair and Impartial Jury.

(7) The Trial Court Also Exhibited Gender-Based Bias.

(8) The Trial Court's Prejudices Deprived Mr. Cooper of a Fair and Impartial Jury.

(9) Jury Misconduct Deprived Mr. Cooper of a Fair and Reliable Guilt and Penalty Determination.

(10) Prosecutorial Misconduct Deprived Mr. Cooper of His Right to Due Process and Resulted in a Fundamental Miscarriage of Justice.

(11) Petitioner Did Not Receive a Fair and Reliable Penalty Determina-

tion in Violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the U. S. Constitution.

(12) The Death Penalty Statute Is Unconstitutional.

(13) Execution After Prolonged Confinement under Sentence of Death is Cruel and Unusual Punishment.

(14) Mr. Cooper Is Deprived of His Statutory Right to Select Method of Execution.

(15) Mr. Cooper Was Denied Due Process, Equal Protection, and Right to Effective Assistance of Counsel on Appeal.

(16) Cumulative Errors.

11. On February 19, 1997, the California Supreme Court denied all of the claims on the merits and also found various procedural bars applicable to various claims.

12. An amended federal petition was filed on March 29, 1996, raising all of the claims presented in the first state habeas petition.

13. A supplemental petition was filed on June 20, 1997.

14. Following an evidentiary hearing, the district court on August 25, 1997, denied Petitioner's first federal petition for writ of habeas corpus as amended and supplemented. *Cooper v. Calderon*, Case No. 92-CV-427.

15. On September 12, 1997, Petitioner filed his second state petition for writ of habeas corpus in the California Supreme Court. *In re Cooper*, Case No. S064320.

16. On September 16, 1997, Petitioner filed objections to the entry of judgment in the District Court, and a motion to "clarify certain issues." Petitioner's motion was deemed a motion for reconsideration and denied by the District Court on November 7, 1997.

17. On April 26, 1998, during the pendency of his appeal to the Ninth Circuit from the District Court' denial of his first federal habeas petition, Petitioner filed a second petition for writ of certiorari in the U.S. Supreme Court concerning the district court's denial of his first federal habeas petition. On June 26, 1998, the U.S. Supreme Court denied that petition for writ of certiorari. *Cooper v. Calderon*, 524 U.S. 963 (1998).

18. On April 30, 1998, Petitioner filed a second federal habeas petition in the district court. The additional grounds raised in the petition were that Petitioner was denied his constitutional right to effective assistance of counsel by his trial counsel's failure to investigate a third party confession to the murders Petitioner was convicted of committing, and by his appellate counsel's failure to raise the issue of ineffective assistance of counsel in this regard on Petitioner's direct appeal.

19. On June 15, 1998, the district court summarily dismissed the second federal habeas petition without an order to show cause or an evidentiary hearing. The court dismissed the petition as untimely, finding that no new facts or law were presented and that because Petitioner had filed a notice of appeal with the Ninth Circuit the court was divested of jurisdiction and authority to again address the merits of the petition. *Cooper v. Calderon*, Case No. 98-CV-818.

20. On June 25, 1998, Petitioner filed a motion in the district court to alter or amend the judgment dismissing the second habeas petition. The district court denied the motion on June 30, 1998. *Cooper v. Calderon*, Case No. 98-CV-818.

21. On December 23, 1998, Petitioner filed his third state habeas petition in the California Supreme Court. *In re Cooper*, Case No. S075527, raising the following grounds:

c. Petitioner's previous appellate counsel, Mark Cutler, had a duty to discover the hair in Jessica's hand and to bring a habeas corpus claim based on the hair, he breached that duty.

d. DNA testing in the instant case can cast fundamental doubt on the accuracy and reliability of the proceedings and establish Petitioner's actual innocence.

22. On March 15, 1999, Petitioner filed a supplemental state habeas petition, also case No. S075527, raising the following grounds:

e. Petitioner's Trial Counsel Rendered Ineffective Assistance By Failing To Present Evidence That Each Of The Murder Victims Had Hair In Their Hands That Was Not Petitioner's;

f. The Prosecution, In Violation Of Its Duty Under *Brady v. Maryland*, Suppressed A Police Report Which Would Have Proven That The Bloody Coveralls Were Deliber-

ately Destroyed By Police;

g. Petitioner's Trial Counsel Rendered Ineffective Assistance By Failing To Present Evidence Implicating The Wearer Of The Bloody Coveralls, Eugene Leland Furrow, In The Ryen-Hughes Murders;

h. Petitioner's Trial Counsel Rendered Constitutionally Deficient Representation By Failing To Question Deputy Eckley Regarding the Decision To Throw Out The Bloody Coveralls;

23. On March 26, 1999, while the third state habeas petition and the supplemental state habeas petitions were still pending, Petitioner filed his fourth state habeas petition. *In re Cooper*, Case No. S077408, raising the following claims:

i. Petitioner's Trial Counsel Rendered Ineffective Assistance b Failing to Present Evidence that Each of the Murder Victims had Hair in Their Hands that Was Not Petitioner's

j. The Prosecution, in Violation of Its Duty Under Brady v. Maryland, Suppressed a Police Report Which Would Have Proven that the Bloody Coveralls Were Deliberately Destroyed by Police.

k. Petitioner's Trial Counsel Rendered Ineffective Assistance by Failing to Present Evidence Implicating the Wearer of the Bloody Coveralls, Eugene Leland Furrow, in the Ryen Hughes Murders

l. Petitioner's Trial Counsel Rendered Constitutionally Deficient Representation by Failing to Question Deputy Eckley Regarding the Decision to Throw Out the Bloody Coveralls.

24. The California Supreme Court summarily denied the third and fourth state habeas corpus petitions on April 14, 1999, without issuance of an order to show cause or an evidentiary hearing.

25. On May 7, 1999, Petitioner filed a motion for clarification of rulings concerning his fourth state habeas petition. The motion was denied on May 12, 1999.

26. On July 9, 1999, Petitioner filed a third petition for writ of certiorari with the U.S.

Supreme Court in case no. 99-5303, challenging the denial of his third state habeas petition by the California Supreme Court. The U.S. Supreme Court denied the petition for writ of certiorari on October 4, 1999. *Cooper v. California*, 528 U.S. 897 (1999).

27. On December 15, 2000, the district court's denial of Petitioner's first federal habeas petition, *Cooper v. Calderon*, Case No. 92-CV-427, was affirmed by the Ninth Circuit on December 15, 2000. *Cooper v. Calderon*, Case No. 97-99030. On July 9, 2001, the Ninth Circuit withdrew its decision and granted Petitioner's petition for rehearing and then issued a memorandum affirming the denial of Petitioner's first federal habeas petition. *Cooper v. Calderon*, 255 F.3d 1104 (9th Cir. 2001), *cert. denied*, 537 U.S. 861 (2002).

28. On August 29, 2001, Petitioner filed a petition for rehearing and rehearing en banc. On January 8, 2002, the Ninth Circuit denied the petition. *Cooper v. Calderon*, Case No. 97-99030.

29. On December 21, 2001, the Ninth Circuit denied Petitioner's request for authorization to file a second a second federal habeas petition, which Petitioner sought to file in the district court in 1998, *Cooper v. Calderon*, Case No. 98-CV-818, raising the claim concerning trial counsel's failure to investigate a confession by a third party to the murders for which Petitioner was convicted. *Cooper v. Calderon*, 274 F.3d 1270 (9th Cir 2001).

30. On February 4, 2002, Petitioner filed a petition for rehearing and rehearing en banc from the denial of authorization to file the second petition. The Ninth Circuit denied on October 18, 2002. *Cooper v. Calderon*, 308 F.3d 1020 (9th Cir. 2002), *cert. denied*, 123 S.Ct. 1793 (2003).

31. Petitioner sought authorization from the Ninth Circuit to file a third federal habeas petition in the district court. *Cooper v. Calderon*, Case No. 99-71430. This petition raised the following grounds: The grounds presented were:

m. Modern Forensic DNA Testing On A-41, The Hair In The Victims' Hands, The Beige T-Shirt And The Handrolled Cigarette Butt Will Demonstrate Petitioner's Innocence;

n. Petitioner's Trial Counsel Rendered Ineffective Assistance By Failing To

Present Evidence Implicating The Wearer Of The Bloody Coveralls, Eugene Leland Furrow, In The Ryen-Hughes Murders;

o. Petitioner's Trial Counsel Rendered Constitutionally Deficient Representation By Failing To Question Deputy Eckley Regarding The Decision To Throw Out The Bloody Coveralls;

p. The Prosecution, In Violation Of Its Duty Under Brady V. Maryland, Suppressed A Police Report Which Would Have Proven That The Bloody Coveralls Were Deliberately Destroyed By Police;

q. Petitioner's Trial Counsel Rendered Ineffective Assistance By Failing To Present Evidence That Each Of The Murder Victims Had Hair In Their Hands That Was Not Petitioner's;

r. In The Absence Of The Cumulative Constitutional Errors Described In Arguments I Through V Of This Petition, No Reasonable Fact Finder Would Have Found Petitioner Guilty of the Ryen/Hughes Homicides;

32. On February 14, 2003, the Ninth Circuit denied Petitioner's Motion to File a Second Habeas Corpus Petition Under 28 U.S.C. Section 2244(b)(3)(A).

33. On March 3, 2003, the court ordered respondent to file a response to Petitioner's claim that the DNA testing was incomplete. The Court criticized Petitioner's counsel for failure to file timely status reports. April 7, 2003, the Ninth Circuit denied Petitioner's "Petition for Rehearing and Suggestion for Rehearing en Banc; Motion to Vacate Order or for Reconsideration or Further Clarification";

34. On April 7, 2003, the Ninth Circuit denied Petitioner's petition for rehearing and rehearing en banc from that denial;

35. On February 11, 2003, Petitioner filed a petition for writ of habeas corpus in the U.S. Supreme Court in Case No. 02-9051, presenting the same underlying claim that was the subject of the Ninth Circuit's denial of authorization to file the second federal habeas petition in the district court, the confession of another person to the murders for which Petitioner was convicted. The U.S. Supreme Court denied the petition on April 21, 2003. *In re Cooper*, 123 S.Ct.

1793 (2003);

36. On May 15, 2003, Petitioner filed his second petition for writ of habeas corpus in the U.S. Supreme Court in Case No. 02-10760. The U.S. Supreme Court denied the petition on October 6, 2003. The grounds presented were:

s. Whether a circuit court can hold an application to file a second petition for habeas corpus in abeyance despite 28 U.S.C. Section 2244(b)(3)(D) and await resolution of timely prosecuted state litigation that would affect the substance of the proposed federal petition;

t. Whether a circuit court reviewing an application to file a second petition for writ of habeas corpus raising issues of trial error may examine the merits of the petition to determine if the Petitioner can establish actual innocence or is limited by statute to a cursory examination of the claims under 28 U.S.C. Section 2244(b)(3)(C)'s prima facie evidence requirement;

u. Whether a circuit court reviewing an application to file a second petition for a writ of habeas corpus may consider as dispositive evidence of post-trial DNA testing offered by the state that has not been subject to any examination by way of cross-examination or at a hearing, and use those results to hold that a Petitioner cannot establish his innocence despite the fact that the state court proceedings to examine the value of those DNA results are pending;

v. Whether the State's suppression of a police report for nearly 15 years that is evidence of a violation of *Arizona v. Youngblood's* proscription against the intentional destruction of material evidence satisfies the requirement of 28 U.S.C. Section 2244(b)(2)(B) that a habeas Petitioner must make a prima facie case relating to his innocence, or requires the circuit court to reopen the original habeas proceeding and consider anew Petitioner's original Youngblood claim;

w. Whether newly discovered claims that trial counsel failed to investigate and present evidence of an alternative suspect, and evidence that hairs inconsistent with Petitioner were found in all four victims' hands, satisfies the prima facie requirements of AEDPA's successor petition provisions.

37. On February 27, 2003, Petitioner filed in the San Diego County Superior Court a

motion seeking an evidentiary hearing on mental retardation under *Atkins v. Virginia*, 536 U.S. 304 (2002). The motion was subsequently deemed by the court to be a habeas petition. The Superior Court denied the petition on June 13, 2003.

38. Petitioner filed motions in the San Diego Superior Court seeking post-conviction DNA testing under California Penal Code Section 1405 of blond hairs found clutched in the hands of victims in his murder case, and seeking EDTA preservative testing under California Penal Code Section 1054.9 of blood found on a T-shirt linked to the murders in order to show that state agents tampered with the blood evidence. On July 2, 2003, following an evidentiary hearing, the superior court denied the motions.

39. On June 24, 2003, Petitioner filed his fifth state habeas petition in the California Supreme Court. On October 22, 2003 the petition was summarily denied on the merits without discovery, an order to show cause or an evidentiary hearing. *In re Cooper*, Case No. S116984. The grounds presented were Petitioner right to a hearing to determine whether he suffers from mental retardation under *Atkins v. Virginia*, and the unconstitutionality of California's death penalty scheme under *Ring v. Arizona*, 536 U.S. 534 (2002).

40. On July 22, 2003, Petitioner filed a petition for writ of mandate in the California Supreme Court seeking review of the San Diego Superior Court's denial of his motion seeking post-conviction DNA testing under Cal. Penal Code Section 1405 of blond hairs found clutched in the hands of victims in his murder case (Case No. S117675).

41. On January 20, 2004, Petitioner filed his sixth petition for a writ of certiorari with the U.S. Supreme Court, from the state court's denial of his habeas petition filed on June 24, 2003. At the time of this filing, that petition is pending.

42. On February 2, 2004, Petitioner filed his seventh state habeas petition in the California Supreme Court. On February 5, 2004, the petition was summarily denied without discovery, an order to show cause or an evidentiary hearing.

x. The grounds presented were:

(1) Whether sufficient evidence of actual innocence existed to bar Mr. Cooper's execution pursuant to the Eighth Amendment and to require consideration of all claims

on the merits regardless of their procedural posture;

(2) Whether the State contaminated or tampered with key pieces of evidence, presented misleading and false testimony and withheld exculpatory material at trial and in post-conviction proceedings;

(3) Whether the government failed to disclose material exculpatory evidence, knowingly failed to correct false testimony, preferred perjured testimony and knowingly argued false theories to the jury;

(4) Whether the unreliable, altered testimony of the sole eyewitness to the crime deprived Mr. Cooper of the witness's exculpatory statements that he did not commit the crime;

(5) Whether Mr. Cooper was deprived of his right to counsel during the DNA proceedings before the San Diego Superior Court in June of 2003; and

(6) Whether the State unconstitutionally deprived Mr. Cooper of access to the judicial process when it arbitrarily refused to file the habeas petition, DNA motion and motion to preserve on January 23, 2004.

43. There are no other petitions currently pending in any court attacking the judgment at issue herein and none has previously been filed except for those set forth above.

44. At the preliminary hearing, arraignment, plea, trial, and sentencing, Petitioner was represented by David Negus. On automatic appeal Petitioner was represented by Mark Cutler. During proceedings in this Court and in the California Supreme Court, Petitioner was represented by Robert Amidon and William McGuigan, appointed by this Court. In the district court, Petitioner was also represented by Charles D. Maurer. Currently Petitioner is also represented by David T. Alexander, George A. Yuhas and Lisa Marie Schull of the law firm Orrick, Herrington & Sutcliffe in the last State post-conviction proceedings.

II.

CLAIMS FOR RELIEF

Petitioner is unlawfully confined, and his conviction and sentence of death have been unlawfully and unconstitutionally imposed in violation of his federal constitutional rights as

guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

As Petitioner has not yet had an opportunity for full factual development through adequate funding, investigation, discovery, access to this Court's subpoena power and an evidentiary hearing, the full evidence in support of the claims which follow is not currently available.

Nonetheless, the evidence which has been obtained to date, and which is set forth below, adequately supports each of Petitioner's claims and justifies an evidentiary hearing and relief. Due to the lack of an opportunity to fully investigate and to present additional facts in support of Petitioner's claims and potential claims, Petitioner reserves the right to amend and/or supplement this petition when he has had the opportunity to avail himself of this Court's processes.

III.

CLAIM ONE

SUFFICIENT EVIDENCE OF ACTUAL INNOCENCE EXISTS TO BAR MR. COOPER'S EXECUTION AND TO REQUIRE CONSIDERATION OF ALL CLAIMS ON THE MERITS REGARDLESS OF THEIR PROCEDURAL POSTURE

Mr. Cooper's conviction, sentence and continuing confinement are unlawful and were unconstitutionally obtained in violation of his rights to a fair trial, to due process of law and equal protection of the laws, to determinations of guilt and punishment free of the arbitrary, capricious, and constitutionally impermissible factors of race discrimination in violation of the Sixth, Eighth and Fourteenth Amendments, to conviction only upon proof beyond a reasonable doubt and to be free of cruel and unusual punishment under the Eighth Amendment because he is innocent of all but the escape charge.

Mr. Cooper's claim of innocence requires that he make a threshold showing that he is probably innocent. His showing must be "truly persuasive." *Herrera v. Collins,* 506 U.S. 390, 417 (1993) (finding that such a showing would have to be "truly persuasive" (O'Connor, J., concurring) or affirmatively prove that he is probably innocent (Blackmun, J., dissenting)); *Carriger v. Stewart,* 132 F.3d 463, 476 (9th Cir. 1997) (explaining *Herrera* standard). Mr. Cooper readily meets that standard.

The facts, among others to be presented after adequate funding, discovery, and access to

this Court's processes, which support this claim and affirmatively show Mr. Cooper is probably innocent are:

1. Those facts set forth in Claims Two, Three and Four, which are specifically incorporated by this reference as if fully set forth herein, demonstrate that the State presented false evidence, including the failure to correct false evidence and testimony, proffered perjured testimony, destroyed evidence, altered evidence, failed to disclose evidence, and knowingly presented false theories to the jury.
2. Mr. Cooper testified at trial that he did not commit the murders and the prosecution provided no motive.

a. Mr. Cooper acknowledged that, after he escaped from the minimum security prison California Institute for Men ("CIM"), he found the Lease house unoccupied and stayed there for a couple of days to hide. He left the Lease house after 8:00 p.m. on Saturday night (June 4) and hitchhiked to San Ysidro, which is near the border of Mexico. (Ex. 74 at 809-10, 812-17, Ex. 75 at 824-29.)

b. Mr. Cooper testified that he never went close to the Ryen house – which was over 125 yards from the Lease house – and in fact was unaware of it. (Ex. 74 at 811.)

c. After snatching a purse that contained over a hundred dollars in quarters, (Ex. 75 at 829-33), Mr. Cooper used those quarters to rent a room in a Tijuana hotel under the name Angel Jackson. (Ex. 75 at 833-37.) The clerk at the hotel confirmed that she rented a room to Mr. Cooper that evening. (Ex. 76 at 843-45].) The sign-in log confirms that Angel Jackson checked in at 4:30 p.m. on Sunday, June 5. (Ex. 77 at 851.)

d. There is no evidence of any motive that Mr. Cooper might have had to either go into the Ryen house or commit the murders. One of the Ryen vehicles was parked in the driveway with keys in it; so entry to the house was not needed to steal a car. (Ex. 78 at 875.)

e. There was also no evidence of theft as a motive. In reviewing the crime scene on the morning after the murders, Detective Duffy observed that there were coins and paper money in plain view on a counter that the perpetrators walked past at least twice. (Ex. 79 at 881-82.) There also were a rifle and some pistols within a few feet of the victims' bodies. (Ex.

80 at 889-90; Ex. 81 at 895.)

3. When Joshua Ryen was discovered still alive, he was immediately taken to the Loma Linda Medical Center.

a. Don Gamundoy testified that he was called into the hospital to assist with Joshua Ryen. When he arrived Joshua was being treated. Mr. Gamundoy began to question Josh, first by trying to communicate with blinking eyes, and then by writing, but neither method worked. Then he wrote out all of the letters of the alphabet and numbers 1 through 10 and "yes" and "no" and then asked Joshua a series of questions. Through that method, Mr. Gamundoy was able to obtain basic information as to Josh's identity. Mr. Gamundoy was also able to determine that three or four people attacked Joshua and that they were male and they were white. Importantly, before Mr. Gamundoy asked Joshua whether his attackers were white, he first asked if they were black and Joshua pointed to "no." He also asked if they were darker in skin, like Mr. Gamundoy, who is Hawaiian, and Joshua said "no." It was not until Mr. Gamundoy's third attempt to ascertain the background of the attackers that he learned that they were white. Joshua also told Mr. Gamundoy that the attack occurred at night, sometime between four and five in the morning. (Ex. 53 at 607.)

b. An emergency room staff member named Calvin Fischer was present when Don Gamundoy communicated with Josh and took notes. Mr. Fischer said that Joshua communicated that three white males were responsible for the death of his family. (Ex. 54.)

c. Immediately after this questioning, Officer Dale Sharp interviewed Joshua Ryen in the emergency room at the hospital. Using hand squeezes to communicate, Joshua told Officer Sharp that three white male adult subjects had been in the house. (Ex. 55 at 617, 619, 621-22, 626.)

d. The following day, after Deputy Sharp introduced Detective Hector O'Campo to Joshua Ryen, O'Campo interviewed Ryen. O'Campo later denied, falsely, that Joshua said anything about multiple assailants, that they were Hispanic, or that one was wearing a red shirt. Others present at the time flatly contradicted O'Campo's version of this interview. (Ex. 58 at 644, 646, 648.) (*See* facts set forth in Claim Four, *infra*.)

e. During the first day after the murders, Linda Headley, a nurse, was present when Joshua Ryen was questioned about the attack. Headley recalls that Joshua told O'Campo that he remembered something about three guys being in a car, one being a Hispanic male with a red shirt. (Ex. 57 at 634-35.)

f. On June 14, 1983, staff psychologist Dr. Jerry Hoyle heard Joshua again describe the perpetrators to Hector O'Campo as "they" and Joshua said that "they chased us around the house" referring to the assailants as "they" and Joshua and Chris Hughes as "we." (Ex. 59 at 656-58.)

g. The next day, Louis Simo, a reserve deputy sheriff with the San Bernardino's Sheriff's office, was guarding Joshua Ryen in his hospital room. While they were playing cards, Joshua saw a photograph of Kevin Cooper's face on television, Joshua told Simo "[t]hat was not the person that did it." (Ex. 60 at 664-65.) (*See* Claim Four, *infra*.)

h. A couple of nights later, Dr. Mary Howell, Joshua Ryen's grandmother and mother of Peg Ryen, was with Joshua when Kevin Cooper's picture was shown on television. Joshua told Dr. Howell that he had never seen Kevin Cooper before. (Ex. 61 at 670-71.)

4. Dr. Irving Root was the pathologist who performed the autopsies on the victims. Dr. Root testified that the victims had three different types of wounds consistent with three different types of weapons (chopping, slashing and puncture). When he conducted the autopsies, Dr. Root had difficulty envisioning how one person could have handled all of the weapons required to create the different types of wounds. (Ex. 63 at 694.) After later speaking with investigating officers who presented Dr. Root with their scenario of the crime did Dr. Root opine that it might be possible for one person to have committed the crime. (Ex. 63 at 694-95.)

5. On the night of the murders, three suspicious men were observed in the vicinity of the murders. (Ex. 30 at 208-09; Ex. 31 at 214, 217.)

a. The manager of the Canyon Corral Bar, located approximately one-half mile from the Ryen house, testified that she saw three white males in the bar at approximately 11:00 or 11:30 p.m. One of the men was wearing a beige or other light color T-shirt. (Ex. 30 at 209-210.)

b. A bartender at the Canyon Corral Bar, Edward Lelko, confirmed that three unfamiliar white males came and left on two occasions on the night of the murder. One of these men was wearing a beige or yellowish T-shirt similar to the T-shirt that was found to have blood on it consistent with Doug Ryen's blood. (Ex. 31 at 217, 219.)

6. Shortly after midnight on June 5, 1983, Douglas Leonard and his wife were driving in the area near the Canyon Corral Bar. (Ex. 64 at 700-01.) As Mr. Leonard was leaving his friends' driveway, he observed and had to stop for a rapidly moving station wagon. (*Id.*) When Leonard described this incident to sheriff's officers soon thereafter, he described this driver as a young white male. (Ex. 64 at 703.) His wife, who was with him, recalls seeing three or four people in the station wagon. (Ex. 64 at 704-05.)

7. Although third parties came forward with information regarding other assailants, law enforcement officers ignored that information, willfully failed to investigate possible assailants other than Mr. Cooper, and destroyed the exculpatory evidence associated with one of the other assailants.

a. Just days after the Ryen/Hughes murders, Diana Roper called the San Bernardino Sheriff's Department and gave specific information indicating that a convicted murderer, Lee Furrow, may have been involved in the murders. (Ex. 82.)

b. She gave sheriff's officers bloody coveralls that would allow her information to be verified by objective scientific testing. Homicide detectives never talked to Roper and approximately six months later the coveralls were destroyed before Mr. Cooper's defense lawyers learned of their existence. (Ex. 83.)

c. When the sheriff's officers finally did interview Ms. Roper, almost a year later on May 16, 1984, she provided detailed facts. (Ex. 121.)

(1) When Furrow got home the night of the murders he went into the house and removed his coveralls.

(2) There were two adult males waiting in a car outside their house.

(3) Ms. Roper believed Furrow was acting oddly and she felt in fear for her life.

(4) The next day the story about the Ryen murders was publicized and she thought Furrow's strange behavior of the night before might be connected.

(5) She checked the coveralls and found blood on them.

(6) She became terrified. She called her father, who came over and confirmed the dried material on the coveralls was blood.

(7) Ms. Roper and her father called the San Bernardino Sheriff's Department and a Deputy Sheriff came to the house.

(8) Ms. Roper heard a few days later that a hatchet was involved. She went outside to where Furrow kept his tools and his hatchet was missing.

(9) Furrow was wearing a beige T-shirt the day of the murders.

(10) The T-shirt that Furrow was wearing on the night of the murders was tan, short-sleeved, with a pocket. The T-shirt was either a medium or a large.

d. On May 17, 1984, Ms. Roper contacted the Sheriff's Department because Furrow had contacted her, upset and shaken that she had contacted the Sheriff's Department. (Ex. 86.)

(1) During the contact, Ms. Roper asked whether the coveralls had been found and tested.

(2) The sheriff's officer said no and responded to her that the coveralls had been destroyed.

(3) Ms. Roper was upset about that, but reiterated that she, her father and the officer that picked them up had seen the blood.

e. On May 18, 1984, investigator Ron Forbush interviewed Ms. Roper and she confirmed the information she gave to Detective Jim Stalnaker (Ex. 84) and added that:

(1) After she turned the bloody coveralls over to the San Bernardino Sheriff's Department and heard nothing from law enforcement, she contacted them. She was told that the department never received them.

(2) Furrow exhibited the same odd behavior that he had displayed after he murdered a young girl years earlier.

(3) After the publicity in which Joshua Ryen had stated three white men committed the murders, Furrow flagged down Ms. Roper's car and cried in her car that he needed to get out of the area.

(4) Ms. Roper described again the state of the coveralls and that they were covered in large areas with thick amounts of blood and horse hair.

(5) Ms. Roper described that the San Bernardino Sheriff's Department officers who came out to get the coveralls did not interview her at all.

f. On May 26, 1984, defense investigator Ron Forbush interviewed Deputy Fredrick Eckley, the deputy who had collected the bloody coveralls from Ms. Roper initially. (Ex. 83.)

(1) Deputy Eckley told investigator Forbush that he collected a pair of coveralls matching the same description as provided by Ms. Roper.

(2) Deputy Eckley further told Investigator Forbush that he believed the coveralls had blood on them.

g. On May 31, 1984, Detective Woods interviewed Deputy Eckley, not to find out what happened to the coveralls, but to find out the nature and substance of the questions asked by investigator Forbush. Deputy Eckley provided Detective Woods with essentially the same information he provided to Mr. Forbush. (Exs. 121, 122.)

(1) Deputy Eckley told Detective Woods that, shortly after the Ryen murders, he retrieved the coveralls, placed them into the evidence storage, and called the homicide division. When no one answered, he left a message.

(2) Deputy Eckley said he did not contact the homicide division a second time, but it was his understanding that his supervisor Sergeant Stodelle had made contact with it.

(3) He said that when no one contacted him, approximately six to nine months after he had collected them, he destroyed the coveralls by throwing them into the dumpster.

h. On May 31, 1984, Detective Woods also interviewed Sergeant Stodelle,

again not to find out what happened to the coveralls, but to find out what Investigator Forbush had asked. Sergeant Stodelle apparently had not bothered to follow up on the existence or testing of the coveralls, and instead learned from Investigator Forbush that the coveralls had been destroyed.

i. On June 11, 1984, Deputy Eckley testified at a hearing that he had destroyed the coveralls on December 1, 1983, while the preliminary hearing was being conducted.

(1) Deputy Eckley destroyed coveralls heavily spattered with blood and covered with animal hair that were turned into him and described as possibly having a Ryen connection with a multiple brutal murder.

(2) The coveralls were destroyed six months after they were received.

(3) Deputy Eckley knew that the case involving Mr. Cooper had not gone to trial at that time.

(4) The destruction occurred in violation of the Sheriff's Department manual that required that all bloodstained items of evidence should be submitted to the crime lab immediately.

(5) Deputy Eckley, the Deputy in charge of evidence for the Yucaipa substation, did not read that manual until May of 1985.

j. The refusal to allow the jurors to know whether there was blood on the coveralls and to whom the blood belonged and to learn in detail about Lee Furrow denied them the basis to find reasonable doubt that there was a single perpetrator of the crime, which was the prosecution's fundamental theory.

8. The harm to Mr. Cooper and to the integrity of the jurors' verdicts flowing from the destruction of the coveralls is closely related to and reinforced by the confession of Kevin Koon.

a. The importance of the coveralls is part of other equally significant evidence that the jury did not hear. While incarcerated at Vacaville prison in 1984, Kenneth Koon confessed that he and two other individuals committed the Ryen and Hughes murders. (Ex. 85.) At great risk to himself, Koon's cellmate Anthony Wisely reported this confession and confirmed

it several times to the sheriff and investigators. (*Id.*) The confession is particularly significant because its substance contains details that are eerily similar to the facts reported by Ms. Roper and other third party witnesses.

b. Koon did not merely admit the murders to his cellmate, but gave specific, verifiable detail about the murders. Koon told the cellmate:

> He was with two other guys that were in the BRAND or Arian Brotherhood [sic] and they driven to the Chino area to collect a debt. He also stated that they had driven to a residence in Chino and that the two guys got out and that they were in for about ten to fifteen minutes and that one of the guys was carrying two axes or hatchets. That he also had gloves on, and that one of them made the statement that the debt was officially collected and that the first guy that came out turned around and said who was that, and then again stated, "Who the fuck is the nigger?" [Koon] said the man that made the statement was looking in the direction of the window and he saw a black subject through the window and that the one subject told [Koon] to get out of there.

(Ex. 85.)

c. The details of the Koon confession mirrored the circumstances of the crime and corresponded to other individuals' testimony or statements.

(1) Koon's statement that multiple people killed the Ryen family with axes or hatchets corresponds to the nature and extent of the victims' wounds and the coroner's initial reaction that the murders could not have been committed by one person alone. (Ex. 63 at 694-95.) His statement also corresponds with Joshua Ryen's initial statements that *three* men, none of whom was Mr. Cooper, committed the murders. (Ex. 60 at 664-45.)

(2) Koon's confession matched the testimony of witnesses who testified they saw *three*, unknown white men in a bar the night of the murders. (Ex. 30 at 209-10; Ex. 31 at 213-19.)

(3) Koon's statement is consistent with those of witnesses who testified they saw *three* to four white men speeding away from the scene of the crime. (Ex. 64 at 700-05.)

(4) Koon's report that the killers were wearing gloves and coveralls explains why no fingerprints were found at the scene at the crime. (Ex. 85.)

(5) Koon's confession also corroborated Diana Roper's statements that Lee Furrow, a convicted killer, left bloody coveralls at her house. (Ex. 85.)

(6) Koon's confession explained why Furrow's hatchet was missing from his tool belt after the murders. (*Id.*)

d. In its opposition to Mr. Cooper's request for clemency, the State observed that Koon's confession to his cellmate should be disregarded because Koon subsequently denied involvement in the murders. (Ex. 87.) It is a strange and unsupportable notion that a confession somehow becomes wholly unimportant and unworthy of significant investigation merely because the confessor later recants it.

e. The State has never addressed the substance of the confessions, including the similarity in detail to other independent sources, and no court has ever ruled on the merits of Mr. Cooper's contentions about them. The State has contended that the confession should be disregarded because they assert that Mr. Koon was high on marijuana when he confessed. (Ex. 87 at 939-41.) The State does not explain how marijuana afforded Mr. Koon the ability to speak in such detail and with such accuracy about the murders. The jury never learned of Koon's confession or its substance, just as it never knew of Mr. Furrow's involvement and all the facts concerning the bloody coveralls.

f. The Koon confession, its detail and accuracy, provides the basis for a reasonable juror to have concluded that Mr. Cooper did not commit the crimes. Like the mitochondrial hairs, it undermines the prosecution's consistent and fundamental theory that Mr. Cooper acted alone.

g. That the confession could provide such reasonable doubt is demonstrated by the opinion of Judge Browning of the Ninth Circuit Court of Appeals:

> Kevin Cooper may be executed without any court considering the merits of colorable evidence that another individual, Kenneth Koon, confessed to the murders.

Cooper v. Calderon, 308 F.3d 1020, 1022 (9th Cir. 2002) (Browning, J., dissenting).

9. Each of the items raised in this writ, alone or in combination with the other items, establishes Mr. Cooper's innocence. They provide convincing evidence that Mr. Cooper is

probably innocent. None was heard by the jury. Had any of the foregoing been heard, the jurors would not have found Mr. Cooper guilty. The jurors' own statements are an eloquent testament to this fact:

a. Jetalyn Kahloah Doxey said:

> I was well aware that law enforcement hid or destroyed some evidence, and fabricated other evidence. I remember police officers lost from the evidence warehouse the rug that contained blood and teeth. The teeth did not belong to Mr. Cooper or the victims. Police also lied about their work. One officer got on the stand and testified that he had never been in the empty home where Mr. Cooper had been staying. His fingerprints were found not just in that home, but in the closet of that home, where evidence against Mr. Cooper was found. Someone put a buckle in a place where it was not located. Early photographs showed that it was originally there. The defense attorney showed that there was not enough from the one drop [of] blood found in the home to re-test. Despite this, after that blood did not match Mr. Cooper's blood, re-testing did this sample, A-41, match Mr. Cooper's blood [sic]. The police's handling of the crime scene was disastrous.
>
> Because the murders were so atrocious, and because of the devastating loss of life, at the time I let the police misconduct go and sentenced Mr. Cooper to death. I now regret that decision. Too much continues to bother me about this case. I am angered by the fact that the jurors were not shown the photograph of Jessica Ryen grabbing onto hair, and the police report that states her [sic] hair is inconsistent with her own. To this day mitochondrial testing has not been conducted to exclude the hair or to identify the owner of that hair. I am angry that the hair has not been tested. I am angered to learn that the officer who testified about the footprints was caught stealing drugs from the evidence locker, and admitted to having in his office a size 9 shoe that would match the prison-issued show said to have been worn by Mr. Cooper. I am bothered to know that a convicted murderer who years before had dismembered his female victim was near the scene at the time, that his hatchet was missing, and that his girlfriend called police and turned in his bloody coveralls. A second man admitted that he [had] been present during the murders, had been to the house where the bloody coveralls were discarded, and knew they were discarded at the house. I am angered to know that over time, the blood on the T-shirt described as one spot of blood developed into a spatter of blood. I am also angered that the sweat on the T-shirt was not tested.
>
> I have followed Mr. Cooper's case, and am aware that there is still testing that has not been done. The blood was not tested for preservative, the hair was not tested, sweat on the T-shirt was not tested. To me, it is not right that as Mr. Cooper approaches his execution, his lawyers have not provided important information to the courts, or investigated his case. He has not had full access to testing.

(Ex. 140.)

b. Roseyln Aquinaga said:

> There are so many unanswered questions that we may never know. Why did Joshua not recognize [sic] Mr. Cooper? Why were there no finger prints found where the evidence showed the should have been? . . . Why with so much blood, was only one drop of Mr. Cooper's blood found. Why did the prosecution cover up evidence? Why was the jury not shown the photograph of Jessica Ryen clutching hair? Why wasn't the hair tested? Why wasn't the jury told about the convicted murderer's bloodied coveralls turned into the police? Why did the police destroy those coveralls? Why wasn't the found beer can ever tested for saliva? These are just some of the many questions I have had over the years.

(Ex. 145.)

c. DonnaMarie Randle said:

> If you were to ask me if this man should be put to death at this time, my answer would have to be no. The way I see it is that if there is even a remote chance that someone else was involved in this tragedy and there is a chance to stop this person or prove innocence then that is what should be done. These are the reasons that I ask that you abey the execution date for this inmate. There are just too many unanswered questions at this point in time and frankly, I find them pretty damn disturbing.

(Ex. 141.)

d. Robin Danalick said:

> I was on the jury for the trial of Kevin Cooper in 1984.
>
> There were a lot of questions not answered. Soon after the trial I heard that the little girl that was killed, had hair in her hands. To my knowledge this was not tested. I would hate to see an innocent man die for something he didn't do, and I would expect the state to explore every avenue to find the truth.

(Ex. 142.)

e. Tamera Loftis, said:

> I am writing this letter to request that testing be done on the hair found in Jessica's hand, as well as testing for the presence of preservatives in the blood spots found. The results would allow closure to the case for surviving family and possibly allow Kevin Cooper to be found innocent of the charges.

(Ex. 143.)

f. Frank J. Nugent (the foreperson) said:

> In recent years, Mr. Cooper's case has drawn interest and closer examination by the family of the victims and the media regarding the judicial process. Questions were raised about the quality of evidence presented, facts not presented to the jury, and newly discovered facts. I do not have the resources or the means to examine all of these questions. I have been told that these questions have been forwarded to you in Mr. Cooper's appeal for clemency. I respectfully ask you and your staff to look into these doubts and concerns for any possibility of lingering doubt.

(Ex. 144.)

g. One juror went so far as to make a plea to the Governor via a video previously provided to the State. This juror asks that the Governor "give the [jurors'] letters a lot of thought." She adds that "there has been a lot of evidence that came out that was not brought out at trial. There was evidence that was very questionable."

h. The jury, which in the context of sentencing for capital crimes, acts as the "conscience of the community," is no longer unanimous as it was briefly in 1985. While the California Supreme Court previously characterized the evidence of guilt as "overwhelming," it is now apparent that that was not the jurors' view. The Supreme Court's observation was made in ignorance of the evidence existing at the time that the jury was not allowed to hear as well as new information after the trial. The jurors deliberated for seven days on the issue of guilt. Indeed, one juror stated that had there been one less piece of evidence, Mr. Cooper would not have been convicted. (Ex. 108 at 1044.) During the jurors' deliberation on sentencing, they were deadlocked twice and reached a verdict during the two hours that it took the attorneys to drive from their offices to the courthouse when told for a second time that the jurors were deadlocked.

10. The fundamental premise of the prosecutor's case was that Petitioner, an African-American who had just escaped from a minimum security prison where he was imprisoned for burglary, was the sole perpetrator of these multiple murders. Yet, clutched in hands of victims of the murders are clumps of hair that did not come from Mr. Cooper. (*See* Claim Two (part 4).) The mitochondrial DNA testing on the blond hair in the clutches of one of the victims, plainly not Petitioner's hair, will establish if there were other assailants. Any non-victim hairs can then be compared with those of the probable murderers that can be obtainable by court order.

11. Similarly, the investigation into the confession of Kenneth Koon, implicating himself, Lee Furrow and Michael Darnell, also shows actual innocence. The details of the confession bore an eerie resemblance to the actual murders. Lee Furrow is a convicted murderer, whose girlfriend, Diana Roper, had sworn came home the night of the murders with bloody coveralls that he took off in the house, while two other men waited in the car outside. She also reported that the beige shirt found near the Ryen home, which allegedly had some of Kevin Cooper's blood on it, was her boyfriend Lee Furrow's.

12. The bloody T-shirt, despite a recent proclamation that Mr. Cooper's blood is on it, points to Mr. Cooper's innocence as well.

i. The handling of the T-shirt by the sheriff's officers raises serious questions concerning the chain of custody and whether it has been contaminated, intentionally or otherwise as alleged in paragraph Claim Two (part 5), *infra.*

j. The State has resisted EDTA testing, an inexpensive analysis that could establish the presence of a preservative in the blood on the T-shirt showing that it came from blood taken from Mr. Cooper after his arrest and not during the commission of a crime.

k. The evidence at trial established that the owners of the Lease house where Mr. Cooper stayed did not recognize the shirt, although they did identify other clothes found in Mr. Cooper's possession when he was arrested that belonged to persons in their house. The T-shirt was not prison issued and no one identified it as coming from the Ryens' home. (Ex. 29.)

l. Diana Roper stated that her then boyfriend Lee Furrow owned a beige T-shirt that resembled the T-shirt found near the Ryen murders. Diana Roper said Furrow was wearing such a T-shirt on the night of the murders, along with the bloody coveralls later destroyed by the Sheriff's Department. (Ex. 82.)

13. The State's sole evidence that Mr. Cooper was present in the victims' house was a single spot of non-victim blood found near the baseboard in the hallway of the Ryens' house. This blood, designated Exhibit A-41, does not support the State's theory.

m. The mishandling of the blood spot by the sheriff's officers and the dubious testing methodology followed by the crime lab demonstrate that A-41 and its testing have been

mishandled and contaminated, intentionally or otherwise, as described more completely in Claim Two (parts 2 and 3), *infra*.

n. While A-41 is the only confirmed spot of non-victim blood found in the Ryen home, the prosecution has other information regarding blood samples in the vicinity of A-41 that has been withheld from the defense. Certain blood evidence closely proximate to A-41 was never collected by the sheriff's investigators. (Ex. 89 at 946.) Other evidence, such as blood from the hallway, was collected and tested. (Ex. 90.) These samples were small blood spots, given the designation "UU," found close to A-41. (Ex. 89 at 946-47.) The evidence reports on these blood samples indicate that they were checked out by Sergeant Arthur for testing by Brian Wraxall. Wraxall's notes state that tests on some of the spots excluded Mr. Cooper. Wraxell recently provided Mr. Cooper's counsel with information that the prosecution instructed him to cease testing UU after initial testing results were inconsistent with Mr. Cooper's blood. (Ex. 211.) The defense was never given access to these spots to perform their own testing. Nor was Mr. Cooper ever provided with Wraxall's complete tests results.

o. The questions surrounding the recovery, chain of custody and testing of A-41 addressed in Claim Two (parts 2 and 3) are pervasive. To date, the prosecution has refused to provide any information regarding these critical issues.

14. Two cigarette butts, designated Exhibits V-12 and V-17, allegedly recovered from the Ryen station wagon have been tested and found to come from Mr. Cooper were used to provide evidence of his guilt.

p. Sheriff's officers' mishandling and the inexplicable disappearance and reappearance of cigarette butts raise serious questions concerning how the cigarette butts got in the Ryen car and whether they were placed there by persons other than Mr. Cooper as described more completely in Claim Two (part 6), *infra*.

q. V-12, one of the cigarette butts found in the Ryens' station wagon that was subjected to non-DNA testing back in 1983, well before DNA testing was available, was measured at 4 millimeters. (Ex. 95.) According to San Bernardino detective Gregonis, V-12 was entirely consumed during testing before trial. (Ex. 96 at 989-90.) Yet, inexplicably, the cigarette

butt designated as V-12 reappeared during trial. (Ex. 97 at 994.) When V-12 was later DNA-tested in 2001, it had somehow grown to 7 millimeters in length. (Ex. 98.) Clearly, the cigarette that was DNA-tested was not the same cigarette butt said to be in the Ryens' station wagon. Whether intentional or the result of gross malfeasance, the State is attempting to execute Mr. Cooper based on this false evidence.

r. Several cigarette butts were found in the Lease house where Petitioner hid. But only a single cigarette butt was retrieved from the Lease house and logged into evidence. The others are unaccounted for. One of these missing cigarettes was originally photographed (Ex. 33) and the evidence that others existed was contained in a sworn sheriff's officer's affidavit. (Ex. 17.) Others were testified to by Mr. Cooper. (Ex. 102 at 1010.) The prosecution has not explained why or how this critical evidence disappeared.

15. One piece of evidence upon which the prosecution relied was a bloody shoeprint that was found on a sheet from the Ryens' bedroom.

s. Detective Duffy initially testified that he had not seen any shoe impression in the master bedroom. (Ex. 79 at 883.) Later, he testified that he had seen and photographed such an impression. (*Id.*) The bed sheet itself had been seized, folded and taken to the crime lab. (*Id.* at 885.)

t. The acting head of the Crime Lab, William Baird, explained that he discovered the bloody shoeprint later when partial shoe impressions in two separate sections of the sheet came together when the sheet was folded in a particular manner. (Ex. 191 at 2384-85.) Mr. Baird, who was subsequently fired for stealing heroin from the evidence locker, testified that the shoeprint was made by a nearly new Pro Keds tennis shoe of a type issued to prison inmates. (Ex. 99 at 1001-02.)

u. A Chino inmate testified that he gave Mr. Cooper a pair of Pro Keds tennis shoes shortly before his escape. (Exs. 100, 103 at 1015.) He has now recanted this testimony. (Ex. 100.)

v. A correctional officer at CIM, Sidney Mason, testified that he gave Mr. Cooper new tennis shoes, but was impeached by a tape-recorded interview in which he said that

only used tennis shoes were being issued at the time in question. (Ex. 104 at 1021-27.)

w. More importantly, the premise of the prosecution's shoeprint evidence was that the tennis shoes given to inmates were a distinctive type not available to the general public. Midge Carroll, the Warden of CIM in Chino, where Mr. Cooper was incarcerated and from which he walked away, has recently explained that she conducted a personal inquiry on this subject and determined that the shoes carried by CIM were not prison-manufactured or specially designated prison shoes. Rather, the tennis shoes used in CIM in Chino were common tennis shoes available to the general public through any number of retail and department stores, such as Sears. (Ex. 101 at 1006.) Superintendent Carroll communicated this information to the lead investigators in the Kevin Cooper case, but was ignored even though she had meticulous records supporting her conclusion. (*Id.*)

16. Each of the areas of evidence discussed above, whether introduced at trial or new evidence, would more probably than not cause a juror to find Petitioner innocent. The sole *piece* of evidence placing Petitioner in the Ryen house is a single drop of blood. If it is more probable than not that a single juror would conclude that a single area of evidence introduced or new evidence would cause reasonable doubt, then the legal standard of actual innocence has been satisfied.

17. The verdict of guilty must beyond a reasonable doubt and unanimous. While doubt by a single juror as to the sufficiency of the State's case would suffice, it is unquestionable that a single juror would find reasonable doubt as to guilt based on the cumulative effect of each of these areas of the State's evidence (for example, blood on T-shirt, a single drop of blood on hallway wall, cigarette butts, type of gym shoes) introduced against Petitioner in light of new evidence not heard by them. This conclusion is further supported by the lengths to which the sheriff's officers went to create false evidence of Mr. Cooper's involvement in the crime. The jury is instructed that a witness false in one material part of his testimony is to be distrusted in others. Thus, if a witness has lied in one part of his testimony, then the rest of his testimony may be entirely discounted. One outstanding example is key detective Gregonis, who was implicated in two key pieces of evidence – the single drop of blood (A-41) and the T-shirt. Mr. Gregonis

originally testified that A-41 had been entirely consumed before trial, only to mysteriously reappear in 1999 and he also falsely testified that he did not open the evidence bag containing A-41 and Petitioner's blood sample when he checked the evidence in a locker in 1999 in anticipation of DNA testing. (Ex. 12 at 50-52.)

IV.

CLAIM TWO

THE STATE CONTAMINATED OR TAMPERED WITH KEY PIECES OF EVIDENCE, PRESENTED MISLEADING AND FALSE TESTIMONY AND WITHHELD EXCULPATORY MATERIAL AT TRIAL AND IN POST-CONVICTION PROCEEDINGS

Mr. Cooper's conviction, sentence and confinement are unlawful and were unconstitutionally obtained in violation of his rights to: (1) be convicted only upon proof beyond a reasonable doubt; (2) a fair trial free of governmental interference; (3) a fair and impartial jury; (4) the effective assistance of counsel; (5) present a defense; (6) compulsory process and confrontation; (7) be free of the infliction of cruel and unusual punishment; and (8) fair adjudicatory procedures and due process, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments. These violations were caused by the State's: (1) failure to disclose potentially exculpatory evidence; (2) contamination of and tampering with key pieces of evidence; and (3) presentation of misleading, false and perjured testimony.

The State's misconduct at the time of trial continued in post-conviction proceedings in violation of Mr. Cooper's rights to due process and in violation of its continuing duties to: (1) disclose potentially exculpatory information, including impeachment; (2) correct false information; and (3) disclose information that may cast doubt on the correctness of a conviction. *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959); *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976); *Thomas v. Goldsmith*, 979 F.2d 746, 749-50 & n.2 (9th Cir. 1992); *People v. Garcia*, 17 Cal. App. 4th 1169, 1179-82 (1993) and federal cases cited therein. The State's conduct was prejudicial. Had it disclosed the potentially exculpatory evidence not contaminated or tampered with key pieces of evidence and not presented misleading and false testimony, Mr. Cooper's conviction and sentence would have been more favorable.

As the facts and supporting exhibits set forth below demonstrate, the full scope of the State's diverse malfeasance is still evolving, even at this late date. The facts, among others to be presented after adequate funding, assistance of competent experts, discovery, and access to this Court's processes, that currently support this claim are:

1. Those facts that are set forth in Claims One, Two, Three, Four and Five are specifically incorporated by this reference as if fully set forth herein, and demonstrate the state's presentation of false evidence, failure to correct false evidence, destruction of evidence and alteration of evidence.

2. There is uncontested evidence that criminalist Gregonis examined certain evidence in 1999, unbeknownst to the defense, and lied about it under oath:

a. On August 13 and 14, 1999, Criminalist Gregonis checked out critical evidence for twenty-four hours, including Cooper's saliva, A-41 (a tin containing blood allegedly found at the scene), and V-17 (a hand-rolled cigarette butt allegedly found in the Ryen vehicle). (Ex. 146 at 1959-81.)

b. Despite the fact that his work on the case had drawn intense scrutiny and criticism at trial, Gregonis, in anticipation of DNA testing, was ordered by District Attorney Kochis to ascertain whether the exhibits existed. (Ex. 105 at 1036.)

c. At the DNA hearing in June 2003, Gregonis testified that he did not open the plastic envelope containing A-41, but only viewed the outer packaging to see if the exhibit still existed. (Ex. 94 at 981-82.)

d. A photograph of A-41 in its packaging as it arrived in the DNA lab in 2001 clearly shows Gregonis' initials and the date of August 13, 1999 on the tape that is sealing the packaging. (Exs. 36, 38.)

e. Initials such as those placed by Gregonis are put on evidence containers **when the criminalist *opens* the container and examines the evidence.** (Ex. 106 at 1039.)

f. The tape seal around the packaging containing A-41 appears different in 2001 from when counsel viewed it in 1998. (Exs. 36, 38.)

3. The evidence that A-41 was subject to tampering prior to or during trial is sub-

stantial:

a. While A-41 is the only spot of non-victim blood found in the Ryen home, the State has other information regarding blood samples in the vicinity of A-41 that has never been disclosed to the defense. Further, certain blood evidence in the same general area as A-41 was never collected by the sheriff's investigators. (Ex. 89 at 946.)

b. Other evidence, such as blood from the hallway, was collected and tested. (Ex. 90.) These samples were small blood spots, given the designation "UU," found within a one-foot radius of A-41. (Ex. 89 at 947.) The evidence reports on these blood samples indicate that they were checked out by Sergeant Arthur for testing by Brian Wraxall. Wraxall's notes state that tests on some of the spots excluded Cooper because Mr. Cooper is a C-D type, and all the sports were a C type. (Ex. 129.) When this became evident, he was instructed immediately to stop the testing. (Ex. 211.) Thus, the remaining blood spots, at least one of which was very close to A-41 (Ex. 128), have never been tested.

c. Criminalist Gregonis testified that he subjected A-41 to blind testing, and that he was not aware of the theory that Mr. Cooper was responsible for the crimes until after Mr. Cooper was arrested. (Ex. 147 at 1984-87.) Gregonis' statement that he was unaware that Mr. Cooper was the sole suspect since immediately after discovery of the crimes is belied by his own notes. A review of his notes and communications demonstrates that Gregonis only did testing of the enzymes contained in A-41 that he knew matched Mr. Cooper. (Ex. 148 at 1990-2001.) He had this knowledge from testing of semen found on a blanket in the Lease house (Ex. 147 at 1984-87), and from his communications with Pennsylvania authorities, well before Mr. Cooper was arrested and his blood obtained. (Ex. 149 at 2004.) Instead of admitting this, he lied under oath. (Ex. 150 at 2007.)

d. When Gregonis conducted additional testing, he used an improper testing method placing A-41 side-by-side with Mr. Cooper's sample. He lied about using this method until confronted by counsel. (Ex. 151 at 2010-12.)

e. When Gregonis read the results of testing on A-41, he found an enzyme that did not match Mr. Cooper, so he altered Mr. Cooper's profile to reflect this enzyme. (Ex.

152 at 2015-18.) He then reported that it was a match. He then "re-evaluated" his initial work when confronted with the fact that A-41 had a different enzyme than he thought, and determined that it did match Mr. Cooper. When confronted with this, Mr. Gregonis went back and altered his original notes in an attempt to hide the initial interpretation that exonerated Mr. Cooper. (Ex. 12 at 75.) He then lied about altering his notes at trial until confronted with it. (*Id.*)

f. Gregonis reported that he had consumed all of A-41 in testing, but two times more of the sample was "found." (Ex. 12 at 50-51.) Each time, he consumed enough without notifying the defense so as to prevent subsequent testing. (Ex. 153 at 2023-24.) He initially lied about this under oath (Ex. 155 at 2032-34), but had to change his testimony when confronted with unnecessary testing. (Ex. 156 at 2039-40.)

g. Gregonis failed to keep adequate records of his testing that would have enabled his results to be verified. This was contrary to standard procedure, and contrary to lab procedures. His photographs were intentionally of poor quality, and he deliberately failed to adequately describe the tests in his notes. (Ex. 113 at 1078-82.) And, although some of the testing was done in June of 1983, none of this testing was actually reported until August of 1983 – ten days after Mr. Cooper was arrested.

h. After trial, A-41 was kept in the same evidence bag as Mr. Cooper's blood sample and saliva sample. (Exs. 90, 92.) According to later testimony, sometime between 1985 and 1995, his blood was removed from this bag and placed in separate storage, although the chain of custody documents do not support the prosecution's contention. It is unknown who did this. (Ex. 92.) When it was put in separate storage, the top seal was not put on in a manner that could reveal if the cap had been removed. (Ex. 157 at 2044-52.)

i. When A-41 was last tested at trial in 1985, and consumed, it consisted of loose chips in a metal tin (chips of plaster board from the wall where State agents claim to have found and removed the blood drop later denominated as A-41). The white plaster chips extracted had been used up and discarded. However, when examined in 1998 by defense counsel, A-41 consisted of one capped vial with white chips, and a tin with a smaller vial inside that contained a single paint chip. (Ex. 208.) Gregonis then examined it in 1999, but never documented what

he did with A-41.

j. In 2001, when A-41 was sent to the Department of Justice lab in Berkeley, California, it consisted of a vial containing white flakes with a cap that was loosened, and a metal tin. When the tin was opened, there was an empty vial inside. Loose within the tin was a paint chip. (Ex. 114.)

4. Department of Justice criminalist Myers gave the impression at the 2003 hearing that all of the potential hairs in the victims' hands had been examined for potential DNA testing, when they had not. The testimony was an attempt to preclude the use of mitochondrial testing on those hairs when, in fact, such testing is very feasible and there is a 100% probability that hairs found clutched in the victims' hands will yield mitochondrial results.

a. Myers and defense expert Ed Blake examined representative samples of hairs found about the victims' hands in 2001. (Ex. 158 at 2056-89.)

b. The examination of the hairs included hairs in clumps. They selected a few hairs from the clump that appeared to contain roots sufficient for conventional nuclear DNA testing. (*Id.*)

c. The hairs were not pulled from the clumps and examined individually to determine which are the likely candidates for mitochondrial testing, such as those with root material that were either likely pulled or fell out during a struggle with the killer(s). This individual examination is critical and never occurred. (*Id.*)

d. Despite this limitation in the examination for hairs to test, criminalist Myers testified that they examined "thousands" of hairs and determined which ones were suitable for further review, but that none of those turned out to have sufficient nuclear DNA. (*Id.*)

e. Myers never revealed to the Superior Court that the examination was not of individual hairs. There are undoubtedly individual hairs that were found in the victims' hands suitable for DNA analysis. (Ex. 211.)

f. If Gregonis had testified completely and truthfully, the Superior Court would have allowed the defense to further examine the individual hairs clutched in the victims' hands and tested those hairs for likely DNA. That DNA could not be Cooper's (as the hairs are

blond and Cooper is African-American) and was likely not the victims' either. (Ex. 11.)

5. The T-shirt, found less than a mile away from the scene that contained victims' blood on it, was the subject of contamination and tampering such that its integrity is highly questionable and any subsequent DNA testing results were unreliable.

a. When it was originally obtained, the T-shirt had been outside for several days, and was found in a ditch less than a mile from the crime scene. (Ex. 159 at 2092-93.)

b. At the time it was found, the T-shirt was described as having one blood-stain on the front middle, near the bottom edge. Three days later, it was described as containing a blood stain "front middle bottom." Three days later, it was again viewed by police and said to have blood "stains on the lower front portion" when it was placed in the crime lab. It was still later described as a "tan colored T-shirt w/poss bloodstains from roadway." (Ex. 160.)

c. Later, at the trial, the criminalist describes the T-shirt as having a blood stain and blood smears. (Ex. 161 at 2120.)

d. Still later, during the trial, the T-shirt was described as having blood stain, blood smears and blood spatter. (Ex. 162 at 2125-27.) In 1998, that is how it appeared. (Ex. 28.)

e. Prior to trial, two separate portions of the T-shirt were tested, but only one result was reported. That result was blood that was inconsistent with Cooper's. The testing was halted at that time. (Ex. 163.)

f. The fact that two areas were tested was not revealed to trial counsel and the results have never been released.

g. The criminalist Gregonis never diagramed the T-shirt and the areas tested as he did for all the other evidence items, nor do his notes reflect such testing as they do for the other items. No photographs of the T-shirt have ever been turned over to the defense, although there were photographs of other evidence items. (Ex. 117 at 1101-04.) The defense could never verify any of the testing, or examine the changed condition of the T-shirt as a result.

h. The T-shirt was taken from the evidence room on August 31, 1983 by Stockwell. (Ex. 209.) There are no reports or results of any examinations he did. The T-shirt

was removed from the evidence room in 1983 for the preliminary hearing by Detective Woods. At that time, he also removed clothing that Cooper was wearing when arrested. (Ex. 27; Ex. 202; Ex. 206.) However, a review of the preliminary hearing record appears to reflect that no T-shirt was ever identified or introduced into hearing. This is supported by the lack of any evidence tag for the preliminary hearing. For reasons still undisclosed to the defense, that evidence remained out for several months. (Ex. 165.)

i. Mr. Cooper was not wearing a beige T-shirt when he escaped from prison, and the owners of the house where Mr. Cooper was hiding after his escape had never seen the T-shirt before. (Ex. 166 at 2140-41; Ex. 29 at 205.) Similarly, the T-shirt was not from the Ryen house.

j. Diana Roper observed that she had purchased a T-shirt just like the one in question for her boyfriend, Lee Furrow, and he was wearing it on the night of the murders. (Ex. 82.) This is the same Mr. Furrow who, according to Roper, disposed of bloody coveralls at Roper's house that same night. (*Id.*)

6. Two cigarette butts found in the Ryen vehicle, V-12 and V-17, were planted and tampered with. These cigarettes, subjected to DNA testing in 2001, unquestionably were not recovered from the Ryen station wagon. At the time of trial, the defense was not concerned with the chain of custody of these cigarettes, or their appearance and shape, because test results were inconclusive because they did not distinguish Mr. Cooper from a large percentage of the population. However, they were considered as evidence that might implicate him, particularly by this court. Now, new evidence has come to light that these were not the cigarettes that were originally seized from the Ryen station wagon:

a. Before the Ryen station wagon was recovered, police had conducted a search of the Lease house and observed what appeared to be cigarette butts contained within a black plastic lid in the master bedroom of the house where Mr. Cooper admits to sleeping and smoking cigarettes. (Ex. 167.) Mysteriously, these cigarette butts were never logged as evidence and apparently vanished. One of the numerous cigarettes was photographed (Ex. 33) and the evidence of others was contained in a sworn sheriff's officer's affidavit. (Ex. 18.) Still others

were testified to by Mr. Cooper. (Ex. 102 at 1009-10.)

b. The initial, thorough and meticulous sheriff's officer's report prepared by Detective Hall during his search of the Ryen station wagon makes no mention of either V-12 or V-17, even though the report does document the recovery of other small items from the very location in the station wagon where V-12 and V-17 were purportedly "found" by criminalists . Stockwell and Ogino. (Ex. 17.)

c. Detective Hall's report also states that cigarettes were found in the ashtray of the Ryen vehicle. Those cigarettes then disappeared because they would implicate someone other than Mr. Cooper of the crime. (Ex. 17.) The Ryens did not smoke cigarettes in the car; occasionally, Mr. Ryen smoked his pipe in it.

d. Criminalists Stockwell and Ogino allegedly memorialized the recovery of butts V-12 and V-17. (Ex. 22.) But, instead of a regular report with times and dates and signatures of the persons responsible for evidence gathering and collection, this "memorialization" is in a handwritten, undated and unsigned note.

e. One of the cigarette butts found in the Ryens' station wagon was denominated V-12 and was subjected to non-DNA testing back in 1983. It was measured at 4 millimeters. (Ex. 95.)

f. A similar cigarette butt was photographed in Mr. Cooper's car in 1983, but then disappeared. (Ex. 34.)

g. V-12 was entirely consumed during testing before trial. (Ex. 169 at 2181-83.) Then somehow, the cigarette butt denominated as V-12 resurrected itself during the trial. (Ex. 97 at 994.)

h. The State's expert at trial, Wraxall, apparently examined both cigarettes from the Ryen vehicle and one from Mr. Cooper's car at the same time, and returned containers that had once held them to the San Bernardino lab in the same evidence bag, but the remnants of V-12, which was only tobacco at that point, were no longer there. (Ex. 171 at 2199.)

i. QQ, a cigarette found in Mr. Cooper's car, was no longer contained in the bag in which it had been stored in the lab, but had been moved to another location, and in 1999

was no longer in that location. (*Id.*)

j. In 2001, when the evidence was being examined for DNA testing, the V-12 that had appeared in court was sent to the lab. When measured, V-12 had actually grown to 7 millimeters and had managed to refold itself. (Exs. 203, 204.)

7. A number of types of evidence were planted at the lease house in an effort to link Mr. Cooper to the crime:

a. Two days after the crime, police observed a hatchet sheath in plain view on the floor of the room in the Lease house where Mr. Cooper had stayed, the inference being that it matched the hatchet identified as one of the murder weapons and that he had left it there before leaving to commit the murders at the Ryen house. However, two days earlier – shortly after the murders – another police officer had entered this same room and did not observe any hatchet sheath at all. (Ex. 172 at 2214.) This officer explained this apparent discrepancy by claiming that he never actually entered the room in conducting his search. However, that explanation was belied by the fact that his fingerprints were found in that room and were clearly a result of his prior search of the room. (Ex. 25 at 180-82.)

b. A rope with a blood spot was found in the closet where Mr. Cooper stayed. However, that rope was indisputably different from one the police attempted to link it to, that found at the crime scene. (Ex. 174 at 2223.)

8. Numerous items of evidence were allegedly neither collected nor pursued, making it more difficult for the defense to prove Mr. Cooper's innocence.

a. Blood samples were taken "on more or less a random basis." (Ex. 174 at 2227.) While the sheriff's officers were seemingly careful enough to spot A-41, a single drop of blood on the hallway wall some distance from where the murders took place, for some reason they failed to collect a spot of blood directly below A-41 that is clearly visible in photographs. (Ex. 176 at 2232.)

b. Equally forgotten was a bloody shoeprint on the rug directly below the A-41 blood spot. They ignored blood found in the bathroom and kitchen areas, a handprint next to a beer can in the refrigerator that could only have been left by the perpetrator, a blood drop on

the body of Chris Hughes, and blood smeared on a light switch. (Ex. 177 at 2236-37, 2240.)

c. Fingerprints found on the door and in the bathroom, that matched neither the victims nor Cooper, were never pursued. (*Id.*)

d. In reviewing the crime scene and its immediate vicinity, police noted blood on the refrigerator, on a light switch and on a beer can – all of which might have come from one or more of the perpetrators. (Ex. 178 at 2244-48.) **None** of this blood evidence was saved or tested.

e. The police failed to preserve the basic integrity of the crime scene and the Lease home by allowing over 70 people to enter the Ryen home during the critical stages of evidence collection. (Ex. 179.)

f. Gregonis unnecessarily used up all the material found under the fingernails of Peg Ryen. (Ex. 180 at 2255-59.)

g. The wallboard that would have allowed for a blood spatter analysis was improperly stored and degraded. A carpet was rolled up prematurely before the crime scene was properly analyzed and then allowed to degrade. (Ex. 181 at 2263-71.)

9. The original opinion of the pathologist was that more than one, and likely three, assailants were responsible. He altered his opinion at Mr. Cooper's trial to correspond with the State's single-perpetrator theory. (Ex. 182 at 2275-77.)

10. A pair of bloody coveralls linked to the crime was thrown out on the very day the state realized that Mr. Cooper's counsel was going to call state officials as witnesses during the preliminary hearing.

a. Two days after the Ryen/Hughes murders, a disinterested witness, Diana Roper, found a pair of bloody coveralls belonging to her then-boyfriend Lee Furrow, that he came home wearing the night of the murders. Furrow had previously been convicted of a brutal knife murder. (Ex. 183.)

b. Believing that Mr. Furrow's behavior had been erratic on the night of the murders, Ms. Roper reported to the police what she had found and relayed the information that led her to believe the coveralls had been worn by a person involved in the Ryen/Hughes murder.

(*Id.*)

c. Roper had previously provided information on another murder that had been proven to be reliable. The Sheriff's Department questioned Ms. Roper and obtained the coveralls and a statement that linked Mr. Furrow to the murders. (*Id.*.)

d. The officer reported the facts to the homicide investigators in charge of the Ryen/Hughes murder, but the investigators deliberately ignored the evidence and failed to report the coveralls' existence to defense counsel. (Ex. 184 at 2297-2303.)

e. Months later, the first day that defense counsel revealed he was going to call State officials as witnesses during the preliminary hearing, police destroyed the coveralls. Only later did the prosecution tell Mr. Cooper's attorney of the Roper report or of the then-irretrievable evidence that might have exonerated his client. (Ex. 185 at 2309-22.)

f. At the hearing on the matter, and at trial, the police asserted that the destruction was the action of one deputy who just decided to destroy them because they had been around so long. (*Id.*) The jurors heard only that there were bloody coveralls that were thrown away and nothing of Mr. Furrow changing out of them the night of the murders while his two companions waited in the car outside.

g. Years later, post-conviction counsel found a police report on the county police microfische records that shows the destruction of the coveralls was accomplished only after supervisor approval, contrary to the testimony at trial. (Ex. 186.)

11. One of the lead detectives on the case, Hector O'Campo, repeatedly lied about Joshua Ryen's statements exonerating Mr. Cooper. (*See* Claim Four.)

12. Several of the State officials involved in the investigation of this case were themselves the subject of criminal investigations:

a. William Baird, the supervising criminalist, had to resign from the San Bernardino Sheriff's Department after stealing drugs – apparently heroin – from an evidence locker. (Ex. 107.)

b. Deputy Sheriff Paul Beltz, the first officer to arrive on the scene, was caught shoplifting. (Ex. 187 at 2324-45.)

c. San Bernardino Sheriff's Department criminalist Daniel Gregonis lied about his handling of evidence in this case and has a history in this case and others of obfuscating his results to assist the prosecution. (Ex. 188.)

13. The investigating officers and the district attorney presented testimony that they knew was false, and which sought to establish that the shoes allegedly worn by Mr. Cooper and tied to prints at the scene were only available through selected outlets and to prisons, when they were informed that such shoes are very common. (*See* claim Three.)

14. New information has recently come to light that a former officer associated with the investigation admitted that he was instructed to plant evidence to frame Mr. Cooper.

a. On January 31, 2004 and February 5, 2004, petitioner's new attorneys obtained a declaration from Kristina M. Rebelo-Anderson, a former reporter for United Press International who covered Cooper's trial, stating that a former law enforcement agent involved in the investigation of the Ryen murders told Ms. Rebelo that Cooper "didn't kill that family" and that instead, the murders were a "hit on the wrong family." Even more alarming, Ruiz stated that law enforcement authorities were "told to plant evidence" in the case to implicate Cooper.

b. Ms. Rebelo became aware of Cooper's imminent execution through a news program aired on January 30, 2004 and immediately contacted Cooper's attorneys. (Ex. 190.) Rebelo also stated that she could not reveal Ruiz's information to anyone, including Cooper's former attorneys, because she promised to protect Ruiz's identity.

15. Absent the State's misconduct, malfeasance and the jury not hearing evidence of other perpetrators, Mr. Cooper would have been acquitted of the crimes at trial. The state's continued misconduct has irreparably prejudiced Mr. Cooper's attempts to secure a new and fair trial.

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V.

CLAIM THREE

THE GOVERNMENT FAILED TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE, KNOWINGLY FAILED TO CORRECT FALSE TESTIMONY, PROFFERED PERJURED TESTIMONY, AND KNOWINGLY ARGUED FALSE THEORIES TO THE JURY

Mr. Cooper's convictions, sentence and confinement were unlawfully obtained in violation of his Mr. Cooper's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, a fair trial, the effective assistance of counsel, confrontation, compulsory process, an impartial jury, present a defense, and reliable guilt, death eligibility and penalty verdicts reached by a jury that was not misled and was not subjected to false and perjurious testimony by a panoply of misdeeds: failing to disclose material exculpatory evidence, knowingly presenting false and perjurious testimony, failing to correct false and perjurious testimony, and knowingly presenting false argument and false statements for jury consumption.

In each instance described below, the prosecutor had the primary and separate obligation to "serve truth and justice first . . . to win fairly . . . and not to tack as many skins of victims as possible to the wall." *United States v. Kojayan,* 8 F.3d 1315, 1323 (9th Cir. 1993). He ignored that obligation repeatedly in failing to disclose exculpatory evidence, *Brady*, 373 U.S. 83, and in the use of false testimony. *Napue*, 360 U.S. 264. Regardless of whether Mr. Cooper's counsel was aware of any of the government's misdeeds, it remains true that "the fundamental conceptions of justice which lie at the base of our civil and political institutions," *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (elicitation of false testimony), are irreparably harmed by governmental manipulation of evidence. The prosecutor here, in a number of ways detailed in the automatic appeal and in prior pleadings before this Court as well as below, failed to remember that the State's interest is "not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). The prosecutor's conduct is actionable under the federal Constitution.

Petitioner alleges the following facts, in addition to those to be presented after full investigation, discovery, additional time, access to this Court's subpoena power and an evidentiary

hearing:

1. Those facts set forth in Claims One and Two, which are specifically incorporated by this reference as if fully set forth herein, demonstrate the State's presentation of false evidence, failure to correct false evidence, destruction of evidence and alteration of evidence.

2. The prosecutor prejudicially suppressed and failed to disclose material exculpatory information that the gym shoes that were such a critical element of its case provided to prisoners at the CIM were neither highly distinctive nor unique to that penal institution or penal institutions of the Department of Corrections and instead adduced false information about their uniqueness.

a. At trial, the prosecution presented evidence that the gym shoes worn by Mr. Cooper were unique to penal institutions and that shoeprints that could have come from such shoes were found on the spa cover at the Ryen home and in blood on the bed sheet in the Ryen master bedroom. A third shoeprint that did not have all of the characteristics of the prints in the Ryen home was found in the dust in a room in the Lease house. Criminalist Baird happened to have such a shoe in his lab. He opined that the same shoes could have made all three prints; he provided an opinion on the size of the shoeprint on the bed sheet (9½ or 10 or 10½) and in the Lease house (10 or 9½), but had no opinion on the size of the print on the spa cover.

b. The defense challenged this evidence on the ground that the shoe print impression belonged to a nearly new tennis shoe, while the shoes given to Mr. Cooper were well-worn size 9 shoes.

c. The prosecution suppressed and failed to disclose information that William Baird, manager of the San Bernardino Sheriff's Department's crime lab, who oversaw parts of the investigation at the crime scene, was fired for stealing heroin from an evidence locker and was using heroin for some time before his testimony in December 1984 on behalf of the prosecution at Mr. Cooper's trial. Mr. Baird's drug use was exculpatory evidence for its effect on his ability to analyze and inspect evidence accurately and render reasonably accurate professional opinions. Mr. Cooper unsuccessfully made a request to San Bernardino County pursuant to Government Code Section 6250, *et seq.* for Baird's personnel records, and that denial is currently

the subject of litigation.

d. The prosecution suppressed and failed to disclose information it obtained from Midge Carroll, who was the Superintendent or Warden of CIM in Chino, California from 1982 through 1985. She specifically told one of the lead law enforcement investigators in Mr. Cooper's case that the shoes purchased by CIM and distributed to inmates were not provided uniquely from a vendor to the prison, but instead were widely available to the public through Sears & Roebuck and other similar retail stores. (Ex. 101.) Not only did the prosecutor suppress this information, but the prosecution also adduced and failed to correct false testimony alleging the "extraordinary uniqueness" of the shoes.

e. Neither the information about William Baird nor the information provided by Superintendent Carroll was provided to trial counsel. Had it been provided to him he would have used it to wholly undermine the prosecution's shoe print evidence. The cumulative effect of these two suppressions of evidence is such that it is reasonably probable that the result in Mr. Cooper's case would have been different, particularly in light of the jurors' view that the case against Mr. Cooper was far from overwhelming, juror deliberations that lasted for many days, and comments that Mr. Cooper would not have been convicted "[i]f there had been one less piece of evidence." Alternatively, the jurors would have spared Mr. Cooper's life based on a lingering doubt about his guilt.

3. The prosecution prejudicially suppressed and failed to disclose material exculpatory information that three Hispanic males, in jail on other charges in the summer 1984, discussed their participation in the Ryen murders. (Ex. 109.)

a. Late in the summer in 1984, correctional counselor Richard C. Krupp interviewed a newly arrived Caucasian prisoner in his 20s with blond or reddish brown hair. The prisoner had been in the San Bernardino County Jail.

b. The prisoner, when asked if he had enemies in the system, responded by telling Krupp that while in a holding cell at the jail, the man overheard three Hispanic males talking about their involvement in the Ryen murders. They talked about the murders being related to the purchase or sale of drugs.

c. Krupp, who had over a decade of experience in the Department of Corrections by the time of this interview in 1984, viewed the prisoner as credible.

d. Krupp reported this information to his supervisors, who contacted the San Bernardino Sheriff's Department.

e. The prosecutor did not disclose this report to Mr. Cooper's lawyer. If he had, defense counsel would have investigated this information and presented it in support of the defense that Joshua Ryen's initial repeated statements about there being three perpetrators were credible and that other individuals, unrelated to Mr. Cooper committed the homicides. (*See* Claim Four, *infra*.)

f. Had this information not been suppressed, it is reasonably probable that Mr. Cooper would have been acquitted or, failing that, that the jury would have had a lingering doubt about his guilt during the penalty phase and spared his life as a result of this doubt.

VI.

CLAIM FOUR

THE UNRELIABLE, ALTERED TESTIMONY OF THE SOLE EYEWITNESS TO THE CRIME DEPRIVED MR. COOPER OF THE WITNESS' EXCULPATORY STATEMENTS THAT HE DID NOT COMMIT THE CRIME

Mr. Cooper's conviction, death sentence, and continuing confinement, are unlawful and were unconstitutionally obtained in violation of his rights to a fair trial, compulsory process, confrontation, present a defense, a reliable determination of guilt by a jury that was not mislead by false evidence and information, conviction upon proof beyond a reasonable doubt, and be free of cruel and unusual punishment as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments by admission of the videotaped examination of Joshua Ryen, and an audio-taped question and answer session between Ryen and his therapist, both of which followed State conduct that produced a false memory and an inaccurate and false report of the crime and the perpetrator.

The facts, among others to be presented after adequate funding, assistance of competent experts, discovery, and access to this Court's processes, that support this claim are:

1. Josh's immediate recollections were consistently that there were several perpetrators. Contemporaneous reports of Joshua Ryen's condition from hospital personnel consistently

noted that although Ryen was severely and seriously wounded and could not speak, that he was mentally oriented and able to understand and accurately convey information. The progress notes and other entries in Joshua Ryen's medical chart confirm this assessment. Subsequent concerns about Ryen's mental alertness – voiced for the first time over a year later by witnesses at trial and voiced by law enforcement only after law enforcement settled on Mr. Cooper and not three men as the perpetrators – are not credible.

a. The first person to communicate at the hospital with Joshua Ryen was Dames Gamundoy, the clinical social worker in the emergency room at Loma Linda University Medical Center. He talked to Ryen on June 5 soon after Ryen arrived. He devised a system for communicating by writing the alphabet and numbers on the board and having Joshua Ryen spell out his answers. He also wrote the words "yes" and "no" to make it easier for Joshua Ryen to communicate. Ryen was able to provide his name, date of birth, and telephone number accurately, before answering questions about the crime. He said that either three or four people were responsible for the attack; that they were male; that they were not Black and did not look like Gamundoy ,who was often mistaken for Hispanic; they were Caucasian. After a little more conversation, Gamundoy left and a uniformed officer – Dale Sharp – stayed with Ryen. (Ex. 53 at 595-607.)

b. Calvin Fischer, a registered nurse assigned to the emergency room, took notes and confirmed Mr. Gamundoy's recollections that Joshua Ryen was alert and able to communicate and that he held up three fingers to indicate the number of attackers. Fischer recalled that Joshua Ryen was questioned by one or more police officer over a twenty-minute period of time before a CAT scan was administered to him. (Exs. 54, 65.)

c. Deputy Sheriff Dale Sharp was the second person to talk to Joshua Ryen on the afternoon of June 5, 1983. He interviewed Joshua Ryen in the emergency room at Loma Linda Hospital before he was taken into surgery and immediately after he arrived at the hospital. Joshua communicated to Sharp that he was awakened between 4:00-5:00 a.m. and became aware that three men were in the house. He was confused about whether the men were white or Hispanic, but was not confused about the fact that there were three of them. Sharp talked to Ser-

geant Arthur three times during the interview. Other officers may have talked to Joshua Ryen as well. (Exs. 66, 53.)

d. On June 6, 1983, sometime before noon Detective Hector O'Campo was assigned to Joshua Ryen, at which time O'Campo was already aware that Joshua Ryen had said the perpetrators were three white men. (Ex. 58 at 639-41.)

e. During the early afternoon Sharp introduced Hector O'Campo to Joshua Ryen. (Ex. 118.) The contemporaneous nursing notes indicate that at noon on that day Joshua Ryen was "answering questions of detective by mouthing words and writing." Joshua Ryen was drowsy but oriented and he told Detective O'Campo that three Hispanic males perpetrated the attack. He provided other numerous details. Nurse Headley, but no psychologist or other mental health professional, was present during the June 6 questioning. (Ex. 57 at 632-35.)

f. Joshua Ryen's grandmother Dr. Mary Howell was also present in her grandson's hospital room, during O'Campo's interview of Joshua Ryen on June 6, 1983. She learned that three men were responsible for the attack, by Joshua's mouthing of words and holding up three fingers. (Ex. 67.) At trial Dr. Howell had forgotten the date of this questioning but acknowledged that her earlier memory was more accurate. She was also present immediately prior to a June 14, 1983 interview of Josh Ryen, although she was asked to leave during the substance of the interview and heard none of that questioning.

g. Also on June 6 at 12:20, Joshua Ryen wrote a note to O'Campo asking how mom and dad were. (Ex. 58 at 642-43.) O'Campo denied that many aspects recalled by Dr. Howell and Nurse Headley occurred. (Ex. 58 at 648.) O'Campo went so far in his testimony as to deny that he talked to Joshua Ryen at all about three Hispanic perpetrators or about what happened to the Ryen family before the interview of June 14, 1983. (*Id.*)

h. O'Campo's assignment while Joshua Ryen was in the hospital was to form a close relationship with him and develop a rapport.

i. Between the June 6 and June 14, 1983 questioning, O'Campo became convinced that Mr. Cooper killed the Ryen family.

j. On June 14, 1983 in the late afternoon or early evening, Detective

O'Campo conducted a detailed interview of Joshua Ryen about the crime with psychologist Jerry Hoyle present.

(1) O'Campo did not tape record the interview, but took notes, which he then destroyed after he wrote a formal report. Unfortunately for O'Campo, however, social worker Jerry Hoyle also took notes, including direct quotes from Joshua Ryen.

(2) O'Campo omitted from his report all plural descriptions of the perpetrators. According to Dr. Hoyle's notes and recollections, Joshua Ryen repeatedly used the word "they" in describing the attack. O'Campo's notes were silent on this point.

(3) Hoyle described Joshua Ryen's demeanor as cool and his speech as spontaneous. (*Compare* Ex. 69 *with* Ex. 68; *see also* Ex. 58 at 644-45.)

(4) Sometime prior to trial, and after learning that Dr. Hoyle's notes differed critically from his own on the factual issue of a single vs. multiple murderers, O'Campo went back to the hospital with Detective Woods to interview Don Gamundoy and Calvin Fisher, and to pick up a set of Dr. Hoyle's notes. (Ex. 58 at 649-51.)

2. After these statements, Joshua Ryen saw photographs of Mr. Cooper on television while Ryen was still in the hospital and well before Mr. Cooper's arrest. Joshua Ryen also saw the media coverage of Mr. Cooper at the time of his arrest. Mr. Cooper appeared on each occasion with his hair combed out in an afro hairstyle.

a. The first time Joshua Ryen saw Kevin Cooper's photograph on television he spontaneously remarked that the man on television was not the person who killed the Ryen family and Christopher Hughes. San Bernardino Deputy Sheriff Simo was one of the people who heard Joshua Ryen make this statement and he called Hector O'Campo immediately thereafter. (Ex. 189 at 2360-61.)

b. That statement occurred in Officer Simo's presence just after O'Campo's lengthy interview of June 14. Dr. Howell heard her grandson make a similar comment about the same time.

c. There are no formal written reports of subsequent contacts with Joshua Ryen, and Mr. Cooper has no right to conduct discovery at this point to determine the nature and

scope of these subsequent contacts. However available information provides strong circumstantial evidence that before Kevin Cooper was arrested, Joshua Ryen was made aware that law enforcement believed Mr. Cooper was guilty of the crimes.

(1) Joshua Ryen's uncle told his nephew of the arrest by telling him only "Josh, I just want to let you know that they caught Kevin Cooper." In order for that statement to have meaning, Joshua Ryen would have to know Cooper's identity and law enforcement's views on his culpability for the crimes. (Exs. 70, 71.)

(2) Thereafter, Joshua Ryen asked if the police were sure that Mr. Cooper was the right suspect, to which his uncle replied "they're very positive that Kevin Cooper is the man they were looking for." (*Id.*)

d. Thereafter, in subsequent statements, Joshua Ryen's memory changed dramatically.

e. In an audio-taped interview of Joshua Ryen played for the jury and conducted on December 1, 1983, by his psychotherapist Lorna Forbes, Joshua recalled seeing a single man with a puff of hair standing over his mother. He recalled little from his earlier interviews in the hospital.

f. In a videotaped examination, played for the jury and conducted in December 1984 predominantly by prosecutor Kottmeier, Joshua Ryen reported seeing a single shadow.

3. Joshua Ryen's subsequent descriptions of his attackers represented errant memory, influenced by the relationships formed with law enforcement, the repetitious questioning, his repeated viewing of Mr. Cooper on television, and the subsequent details of the capture of Mr. Cooper as well as discussions with relatives, law enforcement and therapists. Because Mr. Cooper has not been afforded full discovery, subpoena power and access to either critical law enforcement records, confidential records of therapists and mental health professionals, or personnel who wrote these reports, Mr. Cooper is unable to provide further specificity.

a. Joshua Ryen's initial recollections, provided spontaneously at times and without repeated questioning or comments, contain reliable details about the location of the bodies of his sister, parents and Chris Hughes. They also repeatedly involve three suspects.

b. Later recollections during the intense manhunt for Mr. Cooper and his capture describe a shadow with a puff of hair. The pictures of Mr. Cooper on the television and in the newspaper show him with bushy hair or a puff of hair.

c. Mr. Cooper escaped from the CIM in Chino in braids and a brown jacket. (Ex. 73 at 798-800.) While he might have fixed his braids in the Lease house without leaving hair behind in that house, he could not have fully unbraided his hair and then combed his hair out into a bushy Afro without leaving a substantial amount of hair in the Lease house. None was found by law enforcement.

VII.

CLAIM FIVE

THE STATE UNCONSTITUTIONALLY DEPRIVED MR. COOPER OF ACCESS TO THE JUDICIAL PROCESS WHEN IT ARBITRARILY REFUSED TO FILE THE DNA MOTION, HABEAS PETITION, AND MOTION TO PRESERVE

Mr. Cooper's conviction, sentence and continuing confinement are unlawful and were unconstitutionally obtained in violation of his rights to be free of cruel and unusual punishment, due process of law, equal protection of the laws, and right to effective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments because the courts refused to accept his papers for filing in direct contravention of state and federal law providing for equal access to the courts for all citizens.

In support of this claim, Mr. Cooper alleges the following facts, among others, to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts that are set forth in claims One, Two, Three, and Four, which are specifically incorporated by this reference as if fully set forth herein, demonstrate the state's presentation of false evidence, failure to correct false evidence and testimony, proffered perjured testimony, destruction of evidence, alteration of evidence, failure to disclose evidence, knowingly argued false theories to the jury, and the failure of effective assistance of counsel at the previous DNA hearing.

2. On January 23, 2004, Petitioner attempted to file in the superior court of the State

of California, San Diego County, a motion to preserve evidence for testing, a petition for writ of habeas corpus, and two discovery motions. Given the imminent execution date, Petitioner requested that all the motions be set on shortened time. (Ex. 1 at 2.)

3. Initially, the matters went before Judge Peter C. Deddeh to determine whether that court would consider the Petitioner's papers. Judge Deddeh indicated that he was not as "comfortable" getting involved in the case. Further, without even reviewing the papers, he felt that Judge Kennedy had already addressed a number of issues in the proposed pleadings. (*Id.* at 9.) For this reason he would not allow Petitioner to even *file* the habeas petition. (*Id.*)

4. Judge Deddeh also denied the request to file the motion to preserve evidence. (*Id.*) Judge Deddeh stated that he did not "feel comfortable weighing in in the middle of this case, when again the supreme court is much more familiar with it. Judge Kennedy is more familiar with it." (*Id.*) Judge Deddeh indicated that he did not wish to "insert [himself] into the process." (*Id.* at 9.) Judge Deddeh would not allow the petitions and motions to be filed, but told Petitioner's counsel that she was "free to contact Judge Kennedy," who had handled previous matters in the case. (*Id.* at 10.)

5. Petitioner then proceeded to Judge William H. Kennedy's courtroom. After hearing arguments from both sides, Judge Kennedy stated that he "personally looked at the material, and i defer the filings for acceptance or rejection by the California Supreme Court." (Ex. 2 at 22.) The court's ruling encompassed the motion to preserve, despite the fact that the motion was not related to the June 2003 hearing, which was the subject of the petition for writ of habeas corpus. (*Id.*)

6. The actions by the Superior Court in refusing to accept papers for filing were in direct contravention of state and federal law. The United States Constitution guarantees Mr. Cooper the right to access state courts for filing necessary applications for relief, as much as any other citizen. State law mandates this as well. *See* Cal. Rule Court 4.552 (mandating filing of papers in superior court); Cal. Penal Code § 1405 (requiring filing of DNA application in superior court); Cal. Penal Code § 1504.9 (filing of discovery applications in capital cases in superior court); Cal. Penal Code § 1473 (mandating acceptance of habeas corpus petition alleging

unlawful detention for any reason in superior court). These mandatory state-created liberty interests also create a federal due process right under the Fourteenth Amendment, and their violation is a violation of the equal protection clause of the Fourteenth Amendment as well.

VIII.

CLAIM SIX

THE STATE SUPPRESSED MATERIAL EXCULPATORY EVIDENCE AND ELICITED OR FAILED TO CORRECT FALSE TESTIMONY CONCERNING THE DESTRUCTION OF THE COVERALLS SO AS TO MAKE IT APPEAR THAT THE DESTRUCTION WAS NEITHER INTENTIONAL NOR IN BAD FAITH

Mr. Cooper's convictions, sentence, and confinement were unlawfully obtained in violation of his rights to due process, a fair trial, the effective assistance of counsel, confrontation, compulsory process, an impartial jury, present a defense, and reliable guilt, death eligibility and penalty verdicts by a jury that was not misled and was not subjected to false and perjurious testimony as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution by the State's failure to disclose material potentially exculpatory evidence of a report indicating that Deputy Sheriff Eckley destroyed a pair of bloody coveralls after consultation with superior officers at a time when their value was known and by the knowing presentation of false and perjurious testimony, and by the failure to correct false and perjurious testimony that the destruction was innocent or negligent at best.

Petitioner alleges the following facts, in addition to those to be presented after full investigation, discovery, additional time, access to this Court's subpoena power and an evidentiary hearing:

1. Those facts set forth in claims One, Two, Three, Four and Five, which are specifically incorporated by this reference as if fully set forth herein, demonstrate the State's presentation of false evidence, failure to correct false evidence and testimony, proffered perjured testimony, destruction of evidence, alteration of evidence, failure to disclose evidence, knowingly argued false theories to the jury, and the failure of effective assistance of counsel at the previous DNA hearing.

2. In the late afternoon of June 9, 1983 a formal complaint charging Petitioner with

the Ryen family homicides was filed. (Ex. 18.)

3. Shortly thereafter, at about 5:00 p.m. on June 9, 1983, five days after the homicides in the Ryen home, detective Eckley obtained bloody coveralls from Diana Roper (Kellison) in Mentone, 40 miles from the Ryen home. Detective Eckley contacted detective Greg Benge of the career criminal division about the overalls. Detective Benge instructed Eckley to write a report and forward it to Sergeant Arthur in the homicide division. (Ex. 194.)

4. On June 10, 1983, Sergeant Stodelle told the chief investigating officer, Sergeant William Arthur, of the contents of sergeant Eckley's report about the bloody coveralls.

5. That report contained the following information: on June 9, 1983 at 5:00 p.m., Diana Furrow Kellison contacted Eckley. She said she found a pair of green coveralls in her closet with bloodstains, Arabian horse hair and sweat on them. She suspected that her estranged husband Lee Furrow, who had been paroled three years before after serving time for strangling a female, had put them there. She also told Eckley that she believed the coveralls were linked to the chino murders and had further information on the suspects that she wanted to relate only to the homicide division. (Ex. 194.)

6. Arthur made no attempt to retrieve the coveralls and did not direct any of his subordinates to do so. (Ex. 83 at 907-08.)

7. Eckley made several attempts in June and July 1983 to contact the homicide division about the coveralls, but his telephone calls were not returned. (Ex. 185 at 2320.)

8. Eckley believed Diana Roper (or Diana Furrow or Diana Kellison) to be a reliable informant because she had given reliable information in a prior homicide case. (Ex. 83 at 907.)

9. Eckley did not submit the bloody coveralls to his department's crime laboratory, although he was aware that Sheriff's Department regulations required all bloodstained items of evidence to be immediately submitted. (Ex. 125 at 1162-63.)

10. Sheriff's Department regulations permitted Eckley to destroy the coveralls after ninety days. This would have been in early September 1983. Nonetheless, he did not destroy them at that time. (Ex. 185 at 2321-22.)

11. The preliminary hearing in Petitioner's case began on November 9, 1983. (Ex.

128 at 1182.)

12. Coincidentally on December 1, 1983, the day on which the defense began its presentation of evidence at the preliminary hearing, Eckley destroyed the coveralls. (Ex. 185 at 2322.)

13. Eckley claimed that the decision to throw out the coveralls was his alone. He eventually testified unimpeached at a hitch hearing on the destruction or failure to collect evidence on this point. (Ex. 185 at 2320-22; Ex. 125 at 1162.) He testified similarly before the jury. (Ex. 200 at 2447-60.) The inferences the state wanted to draw from Eckley's testimony were false. The prosecutor knew this, but did nothing to correct Eckley's implication that he destroyed these coveralls on his own and only because the requisite preservation time had expired.

14. In early May 1984, a Hitch hearing on the lawfulness of the destruction, loss, consumption, or failure to gather a number of items of evidence began in Petitioner's case. As a result of the publicity surrounding the hearing, the Kellison/Roper family contacted Petitioner's trial counsel and told him about the coveralls. (Ex. 183 at 2292.) This was the first information that Mr. Cooper's attorney, David Negus, had about the existence of the bloody coveralls.

15. The state failed to disclose Eckley's December 1, 1983 Disposition Report to trial counsel. In fact the state suppressed it and failed to disclose it at any time in Petitioner's case.

16. The Disposition Report only came to light in December 1998 after Petitioner's investigator reviewed the Sheriff's Department's microfiche and microfilm file on the Ryen and Hughes homicides. (Ex. 195.)

17. The Disposition Report indicates that the coveralls were destroyed as having no value and that the citizen's report that these items possibly belonged to the suspect was unfounded. The disposition was reviewed by someone with the initials "K.S." (Ex. 186.)

18. Petitioner's investigator, a former police officer, recognized the significance of this report and the information contained on it, i.e., that it indicated that Eckley did not destroy the coveralls on his own initiative, but that he did so after consultation with someone in the homicide division or with his supervisor. (Ex. 195.)

19. Petitioner's investigator's attempted to discuss Eckley's reports – his initial June

1983 report and the December 1983 Disposition Report – with him were rebuffed as were other attempts to obtain information. (Ex. 195.)

20. The Disposition Report was material and exculpatory because it would have provided the jury with clear documentary evidence that the destruction of an item pointing to a perpetrator other than Petitioner had been accomplished deliberately by the prosecution. In addition, such an action would have provided the jurors with circumstantial evidence from which they could conclude that other evidence pointing to someone other than Petitioner as the perpetrator similarly was destroyed intentionally and would have supported Petitioner's defense that he was framed.

21. The jurors would not have convicted Petitioner if they had one more piece of evidence pointing away from him as the perpetrator or if they had reason to discount one of the pieces of prosecution evidence. This was such evidence. As a result of the government's suppression of the Disposition Report and the prosecutor's elicitation of testimony that was effectively false or his failure to correct the same, either alone or in combination with other governmental misconduct alleged herein, had a substantial and injurious effect on the jury's verdict in this case.

IX.

CLAIM SEVEN

TRIAL COUNSEL PREJUDICIALLY RENDERED INADEQUATE ASSISTANCE OF COUNSEL IN FAILING TO INVESTIGATE AND PRESENT THAT ANOTHER PERSON CONFESSED TO COMMITTING THE CRIMES WITH WHICH PETITIONER WAS CHARGED

Mr. Cooper's convictions, sentence, and confinement were unlawfully obtained in violation of his rights to due process, a fair trial, the effective assistance of counsel, confrontation, compulsory process, an impartial jury, present a defense, and reliable guilt, death eligibility and penalty verdicts by a jury that was not misled by misinformation as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution by trial counsel's negligent and prejudicial failure to introduce evidence that another person confessed to committing the crimes with which Petitioner was charged. Trial counsel's failure to further investigate and present evidence

of this confession fell below the standard of care to be expected of reasonably competent counsel acting as a zealous advocate at the time of Petitioner's trial. Had counsel's performance not been deficient, Petitioner would not have been convicted or, failing that, would not have been sentenced to death.

Petitioner alleges the following facts, in addition to those to be presented after full investigation, discovery, additional time, access to this Court's subpoena power and an evidentiary hearing:

1. Those facts that are set forth in claims One, Two, Three, Four and Five, which are specifically incorporated by this reference as if fully set forth herein, demonstrate the State's presentation of false evidence, failure to correct false evidence and testimony, proffered perjured testimony, destruction of evidence, alteration of evidence, failure to disclose evidence, knowingly argued false theories to the jury, and the failure of effective assistance of counsel at the previous DNA hearing.

2. Trial testimony began in Petitioner's case in the guilt phase on October 18, 1984.

3. On December 17, 1984, Detective Woods received a telephone call from Lt. Henson at the California Medical Facility at Vacaville (CMF), a penal institution within the California Department of Corrections. Henson told Woods he had information about the Kevin Cooper case. (Ex. 85 at 923-24.)

4. Henson told Woods he talked to an informant named Anthony Wisely, a prisoner at CMF. Wisely told Henson that in November Wisely had a conversation with Kenneth Koon after Koon had smoked some weed or marijuana. Koon said he went to the Ryen home with two other people and killed the Ryen family. (*Id.*)

5. On December 19, Woods interviewed Wisely at CMF. Wisely reported that after both he and Koon smoked marijuana, Koon began to cry. Wisely identified Koon as affiliated with the Aryan Brotherhood. Koon told Wisely that he and two others went to Chino to collect a debt. They went into the house with two axes or hatchets. After they returned they told Koon the debt was paid. Koon changed his coveralls at his girlfriend's or "old lady's" house. His girlfriend possibly turned in one of the weapons. Wisely could not remember Koon's girlfriend's

name. Koon told Wisely he thought they hit the wrong house. (*Id.*)

6. Woods asked wisely about the possibility of Woods' talking to Koon. Wisely said that if Woods did so, that Koon would immediately know that wisely had informed on him. If this happened wisely believed he would become a marked man who would be killed in prison. (Ex. 85 at 925-26.)

7. After this interview Woods left the interview room and examined Koon's prison file. The file showed that from October 11, 1982 to November 7, 1983, Koon was out of custody. (*Id.*)

8. Woods also noticed that Koon's emergency contacts included Diana Roper in Mentone and Terry Kellison, also in Mentone. (*Id.*)

9. Woods then made the connection between the hatchet and coveralls and Diana Roper's contact with the Yucaipa substation in San Bernardino. (*Id.*)

10. Woods returned to the interview room and asked Wisely if Diana Roper was the name Koon gave as his girlfriend and Wisely said yes. (*Id.*)

11. Despite Wisely's fears, Woods then interviewed Kenneth Koon before returning to San Bernardino. Koon acknowledged that he knew Diana Roper and that she was his girlfriend. He said he remembered the incident in which she turned over bloody coveralls to the Yucaipa substation. He believed they belonged to Lee Farrell [sic]. This occurred directly after the Chino Hills murders. Koon said that law enforcement lost or destroyed the coveralls. Koon declined to answer questions about the Aryan Brotherhood, other than to say that at first he was not affiliated with them. (Ex. 196.)

12. Woods' reports were written on December 21, 1984. (Ex. 85 at 926.)

13. These reports were turned over to Petitioner's lawyer on January 2, 1985, immediately before Petitioner was to testify. Petitioner's counsel said he did not need more time to investigate. (Ex. 199 at 2438-42.) Immediately thereafter Petitioner testified.

14. On January 12, 1985, Petitioner's investigator went to interview Anthony Wisely at CMF. Wisely refused to be interviewed about his earlier statements. He explained that since his interview with Woods on December 19, he had been in the "hole" or security housing.

Wisely said that if the investigator had been present when Wisely and Koon were talking, the investigator would understand that Petitioner did not commit these crimes. Wisely conveyed to Petitioner's investigator that he suffered at the hands of the State as a result of trying to be helpful. (Ex. 198.)

15. Trial counsel failed to follow-up on the information, despite the fact that key elements of Wisely's information were independently verified by the crime scene, the events of June 1983 concerning the discovery of the coveralls, and the may 1984 interactions with Diana Roper about Lee Furrow and the coveralls. Counsel did not make the connection between the coveralls, Furrow, and the information supplied by Wisely and did not further investigate where Koon lived while out of custody during the time of the Ryen murders. Counsel did not use Koon's information about Lee Furrow. All of these omissions fell below the standard of conduct to be expected of reasonably competent counsel.

16. Even if counsel determined he could not produce admissible evidence at the guilt phase of this confession or third party culpability of the crime at the guilt phase, counsel rendered ineffective assistance of counsel in failing to seek admission of Woods' testimony recounting the wisely statement to Woods pursuant to *Green v. Georgia,* 442 U.S. 95 (1979).

17. Counsel's omissions were prejudicial because otherwise Petitioner would not have been convicted, or minimally, would not have been sentenced to death. The jurors would not have convicted Petitioner or voted to impose the death penalty if they had one more piece of evidence pointing away from Petitioner as the perpetrator or if they had reason to discount one of the pieces of prosecution evidence. This was such evidence. Counsel's negligent representation, alone or in combination with the other instances of ineffectiveness alleged in this petition had a substantial and injurious influence or effect on the jury's verdict in this case.

X.

CLAIM EIGHT

TRIAL COUNSEL PREJUDICIALLY RENDERED INADEQUATE ASSISTANCE OF COUNSEL IN FAILING TO LINK THE BLOODY COVERALLS TO SUSPECT LEE FURROW

Mr. Cooper's convictions, sentence, and confinement were unlawfully obtained in viola-

tion of his rights to due process, a fair trial, the effective assistance of counsel, confrontation, compulsory process, an impartial jury, present a defense, and reliable guilt, death eligibility and penalty verdicts by a jury that was not misled by misinformation as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution by trial counsel's negligent and prejudicial failure to introduce evidence connecting the bloody, destroyed coveralls to Lee Furrow and the defense that someone other than Petitioner committed the Ryen/Hughes crimes. Trial counsel's failure to present evidence of this link, which counsel obtained from police reports and during interviews by his own investigator, fell below the standard of care to be expected of reasonably competent counsel acting as a zealous advocate at the time of Petitioner's trial. Had counsel's performance not been deficient, Petitioner would not have been convicted or, failing that, would not have been sentenced to death.

Petitioner alleges the following facts, in addition to those to be presented after full investigation, discovery, additional time, access to this Court's subpoena power and an evidentiary hearing:

1. Those facts that are set forth in Claims One, Two, Three, Four and Five, which are specifically incorporated by this reference as if fully set forth herein, demonstrate the State's presentation of false evidence, failure to correct false evidence and testimony, proffered perjured testimony, destruction of evidence, alteration of evidence, failure to disclose evidence, knowingly argued false theories to the jury, and the failure of effective assistance of counsel at the previous DNA hearing. Claims Seven and Nine delineate trial counsel's ineffectiveness and are incorporated by this reference as if fully set forth herein

2. Those facts and allegations concerning the destruction of the coveralls and trial counsel's discovery of their existence in may 1984, as set forth in Claim 6 are incorporated by this reference as if fully set forth herein.

3. Soon after counsel learned of the existence of the coveralls in may 1984, he undertook to investigate their ownership. (Exs. 83, 121.)

4. On May 26, 1984, Petitioner's trial investigator interviewed Deputy Sheriff Eckley. Eckley told Petitioner's investigator that he went to Diana Roper's (Kellison's) house in

Mentone in response to a telephone call from her father. At the house he obtained a pair of green cotton coveralls from a closet. In Deputy Eckley's view there was a moderate amount of dry blood – splattered not soaked – from the knees down as well as hair. The coveralls smelled. Roper believed the coveralls had been left in her house by a man named Lee Furrow. Roper told Eckley that Lee Furrow had been in prison and had a prior murder offense on his rap sheet. (Ex. 83 at 905-07.)

5. In that same interview Eckley told Petitioner's investigator that Diana Roper and her family had given reliable information in the past with respect to a murder investigation. (*Id.*)

6. Eckley also told Petitioner's investigator that after he talked to Diana Roper, he took the coveralls outside where he and Roper's father saw blood, hair and dirt on them. Eckley was aware of the developments in the Cooper case and called a supervisor to find out who in homicide he should contact. He put the evidence in a locker and wrote a report. He could not reach anyone in the homicide division, but he left a message. (Ex. 83 at 907.)

7. On May 16, 1984, Detective Stalnaker interviewed Diana Roper. His report discusses Lee Furrow and the bloody coveralls. When Furrow came into her house to get undressed, she saw two men in a car outside waiting for him. He explained that he had stopped in a bar on the way home. He changed out of the coveralls and left. The next morning she heard about the Ryen/Hughes homicides. A few days later she learned law enforcement officers found a hatchet. She went outside to the back porch where Furrow hung his tools and noted that the hatchet was missing. Roper also told Detective Stalnaker. (Ex. 84 at 916.)

8. During this same interview, Roper told Stalnaker that Furrow had murdered Mary Sue Kitts at a time when he was strung out on cocaine. He was similarly strung out on cocaine at the time of the Ryen/Hughes homicides and his pattern of behavior was similar during both time frames. (Ex. 84 at 917.)

9. During the same interview, Diana Roper provided information linking a beige T-shirt to Furrow. She purchased a beige T-shirt for Furrow at K-Mart. The size was either a medium or a large. (Ex. 84 at 916 and 921.)

10. The T-shirt described by Roper in the interview with Stalnaker was the same in

appearance as that found outside the bar and retrieved by Deputy Sheriff Fields. (Ex. 84.) That T-shirt was later found to have blood on it that was consistent with Doug Ryen. (Ex. 12 at 91-93.)

11. On May 17, 1984, Stalnaker conducted a telephone interview with Diana Roper. Again they discussed the bloody coveralls and the link between Furrow and the coveralls. Roper opined that it was odd for the deputy sheriffs to be checking into the coveralls nearly a year after she turned them over. She was shocked that they were never "labbed" in order to learn more about the blood on them. (Ex. 86 at 932.)

12. On May 31, 1984, Detective Woods interviewed Eckley and memorialized his interview in a report that same day. Eckley told Woods that Petitioner's investigator had interviewed him and was interested in the nature and quantity of the blood. Eckley told Woods that he understood that both Sergeant Stodelle and another detective contacted the homicide division about the coveralls before they were destroyed. (Ex. 122.)

13. Petitioner's counsel received these reports in discovery. Each report bears the prosecution's numbering system. The reports do not, however, appear together in the discovery.

14. Petitioner's counsel unreasonably and prejudicially did not follow-up on the information in the reports, nor did he present the jurors with evidence from which they could conclude that the coveralls and T-shirt belonged to Lee Furrow; that Lee Furrow had a violent past; that Furrow had been in prison for dismembering and murdering a seventeen year old female; that Furrow admitted committing a hatchet murder on another occasion; and that Karee Kellison saw Lee Furrow and a woman named Debbie Glasgow get out of a station wagon that held two other occupants in the early morning hours of June 5, 1983. (Ex. 197.)

15. Had counsel interviewed Diana Roper and Karee Kellison, among others, he would have learned of the strong link between Furrow, the overalls and T-shirt, and the Ryen murders, and would have presented powerful testimony to the jury. (*See e.g.*, Ex. 82 at 896-901; Ex. 197.)

16. Counsel's omissions were prejudicial because otherwise Petitioner would not have been convicted, or minimally, would not have been sentenced to death. The jurors would not

have convicted Petitioner or voted to impose the death penalty if they had one more piece of evidence pointing away from Petitioner as the perpetrator or if they had reason to discount one of the pieces of prosecution evidence. The connection between Lee Furrow, the T-shirt, and the coveralls was such evidence. Counsel's negligent representation, alone or in combination with the other instances of ineffectiveness alleged in this petition, had a substantial and injurious influence or effect on the jury's verdict in this case.

XI.

CLAIM NINE

TRIAL COUNSEL PREJUDICIALLY RENDERED INADEQUATE ASSISTANCE TO PETITIONER IN FAILING TO INTRODUCE TESTIMONIAL, PHOTOGRAPHIC, AND DOCUMENTARY EVIDENCE THAT THE VICTIMS' WERE CLUTCHING BROWN AND BLONDE HAIR IN THEIR HANDS WHEN THEY WERE KILLED

Mr. Cooper's convictions, sentence, and confinement were unlawfully obtained in violation of his rights to due process, a fair trial, the effective assistance of counsel, confrontation, compulsory process, an impartial jury, present a defense, and reliable guilt, death eligibility and penalty verdicts by a jury that was not misled by misinformation as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution by trial counsel's negligent and prejudicial failure to introduce evidence that the victims' were clutching brown and blond hairs in their hands that could not have come from Petitioner. Trial counsel's failure to present evidence of the brown hairs, and the light colored hairs that were clutched in such a manner that they could only have come from the perpetrators, fell below the standard of care to be expected of reasonably competent counsel acting as a zealous advocate at the time of Petitioner's trial. Had counsel's performance not been deficient, Petitioner would not have been convicted or, failing that, would not have been sentenced to death.

Petitioner alleges the following facts, in addition to those to be presented after full investigation, discovery, additional time, access to this Court's subpoena power and an evidentiary hearing:

1. Those facts that are set forth in claims One, Two, Three, Four and Five, which are specifically incorporated by this reference as if fully set forth herein, demonstrate the State's

presentation of false evidence, failure to correct false evidence and testimony, proffered perjured testimony, destruction of evidence, alteration of evidence, failure to disclose evidence, knowingly argued false theories to the jury, and the failure of effective assistance of counsel at the previous DNA hearing. Claims Seven and Eight delineate trial counsel's ineffectiveness and by this reference as incorporated as if fully set forth herein.

2. The autopsy report for Jessica Ryen stated that there were numerous hairs in and adhering to Jessica Ryen's hands. (Ex. 201.)

3. A photograph that was provided to trial counsel showed Jessica Ryen's hands clutching numerous strands of hair in her hands in such a way that the hair could not have drifted into her hands from the carpeting. (Ex. 11.)

4. A San Bernardino County Sheriff's Department laboratory report dated June 14, 1983 stated that hair was found in the hands of each victim and that these hairs had been removed from the victims' hands during the autopsy. (Ex. 202.)

5. As is obvious from a gross comparison, none of these hairs could have come from Petitioner, who is African-American and the crime lab so concluded.

6. Trial counsel unreasonably and inexplicably failed to introduce the photographs of the hairs and testimony thereon during Petitioner's trial.

7. Petitioner was prejudiced by this omission. Although no reasonable scientific analysis or comparison of these hairs using acceptable rigorous systematic procedures has yet to be performed because Petitioner has been unable to obtain testing that he has repeatedly requested, it is nonetheless obvious from the jurors' own letters that the existence of these blond and brown hairs, some of which were clutched and entwined in the victims' hands would have made a difference to their verdicts.

8. Had counsel shown the jury the photograph of the hair clutched in the victims' hands, particularly those of Jessica Ryen, and presented testimony thereon, and showed the jurors all of the rest of the hair found in the other victims' hands, the jury would have heard powerful evidence suggesting that Petitioner, an African-American male was not the perpetrator.

9. Counsel's omissions were prejudicial because otherwise Petitioner would not have

been convicted, or minimally, would not have been sentenced to death. The jurors would not have convicted Petitioner or voted to impose the death penalty if they had one more piece of evidence pointing away from Petitioner as the perpetrator or if they had reason to discount one of the pieces of prosecution evidence. The connection between Lee Furrow, the T-shirt, and the coveralls was such evidence. Counsel's negligent representation, alone or in combination with the other instances of ineffectiveness alleged in this petition, had a substantial and injurious influence or effect on the jury's verdict in this case.

XII.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that this Court:

1. Take judicial notice of the contents of the certified record on appeal and all pleadings, orders and other documents filed in *People v. Cooper*, California Supreme Court, Case No. 004687; *In re Kevin cooper*, Case No. S052741; *In re Kevin Cooper*, Case No. S075527; *In re Kevin Cooper*, Case No. S077408; and *In re Kevin Cooper*, Case No. S116984, and all pleadings, documents and papers on file with this Court;

2. Issue an immediate stay of Mr. Cooper's execution, set for February 10, 2004 at 12:01 a.m.;

3. Order respondent to show cause why Petitioner is not entitled to the relief sought;

4. Grant Petitioner the right to seek sufficient funds and time to secure additional investigative and expert assistance as necessary to prove the allegations in this petition;

5. Order the San Bernardino County District Attorney and the prosecuting deputy district attorneys to turn over all files pertaining to Mr. Cooper's case and grant Mr. Cooper leave to conduct discovery, including the right to take depositions, request admissions, propound interrogatories, issue subpoenas for documents and other evidence, and afford Petitioner the means to preserve the testimony of witnesses;

6. Order an evidentiary hearing at which Mr. Cooper will offer this and further proof in support of the allegations herein;

7. Permit Petitioner a reasonable opportunity to supplement the evidentiary showing

in support of the claims presented here and to supplement the petition to include claims that may become known as the result of further investigation and information which may hereafter come to light;

8. Permit Mr. Cooper the opportunity to test the hairs found clutched in the victims' hands to determine if they are from the perpetrator, and the T-shirt to determine the presence of preservatives that would indicate tampering;

9. After full consideration of the issues raised in this petition, considered cumulatively and in light of the errors alleged on direct appeal, vacate the judgment and sentenced imposed upon Petitioner in San Diego County Superior Court No. CR 72787; and

10. Grant Petitioner such further relief as is appropriate and fair in the interests of justice.

Dated: February 6, 2004.

DAVID T. ALEXANDER
GEORGE A. YUHAS
LISA MARIE SCHULL
ORRICK, HERRINGTON & SUTCLIFFE LLP

David T. Alexander

Attorneys for Plaintiff
KEVIN COOPER

VERIFICATION

I, David T. Alexander, hereby declare:

1. I am a member of the State Bar of the State of California and admitted to practice before all courts of this State. I am a partner with the law firm of Orrick, Herrington & Sutcliffe LLP. I am retained counsel for Petitioner Kevin Cooper in this matter. I have personal knowledge of the matters set forth in this Petition for Writ of *Habeas Corpus*, except as otherwise indicated, and could and would competently testify to them if called upon to do so.

2. Mr. Cooper is in custody and restrained of his liberty in a county other than where my office is situated. For this reason, I am making this verification on his behalf.

3. I have reviewed the foregoing Petition for Writ of *Habeas Corpus*. I verify that all of the alleged facts that are not otherwise supported by citations to the records or declarations to the attached petition are true and correct to my own knowledge, except as to the matters stated in it on information and belief, which I am informed and believe are true and correct.

4. I also verify that I am authorized to file this petition on Mr. Cooper's behalf.

I declare under penalty of perjury under the laws of the United States of America that the foregoing statements are true and correct and that this declaration was executed on February 6, 2004 at San Francisco, California.

David T. Alexander